

KOSHER WITHOUT LAW: THE ROLE OF NONLEGAL SANCTIONS IN OVERCOMING FRAUD WITHIN THE KOSHER FOOD INDUSTRY

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I. INTRODUCTION

What is the appropriate legal response to “Order Without Law”?¹ That is, should laws change when private actors—for example, organizations, trade industries, and institutions—develop their own *law* through extralegal, or to be more accurate, nonlegal customs and practices? At first glance, this question might seem analogous to a tree falling in the forest. When private actors opt out of legal enforcement mechanisms, such as court enforcement of tort or contract, there is no invitation for law to act; therefore, the content of the legal rule not chosen appears moot. Recent empirical scholarship exploring nonlegal systems, whether it is focused on cattle ranchers in Shasta County² or diamond merchants in New York City,³ often relies on a

1. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1994).

2. *Id.* at Part I.

3. Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Barak D. Richman, *Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York* (Sept. 2002) (unpublished manuscript, on file with John M. Olin Center for Law, Economics, and Busi-

premise that “[l]aw simply [does] not matter in a community with well developed norms.”⁴

But what happens when law needs no invitation? Often, the decision to opt out of criminal and civil enforcement schemes does not rest in the hands of the private actors who have created nonlegal sanctions governing the same behavior. Within the context of multitiered enforcement, is opting out an all or nothing proposition? How can law avoid its inherent sovereign nature of trumping that which nonlegal actors have created and, instead, augment, supplement, or complement these delicate private systems?

This Article offers a case study⁵ of the nonlegal sanctions used to police the kosher food industry⁶ and explores appropriate multitiered enforcement solutions in the face of partial opt out. There are three tiers of enforcement that aim to prevent fraud within the kosher food industry. At the base level are private actors—organizations, individuals affiliated with the industry in a variety of ways, and an entire subindustry of certification intermediaries—who monitor, disseminate information, and sanction to solve the problems of misinformation, misrepresentation, and fraud in the kosher food industry (Tier One). Next, consumers and other industry participants can turn to private law enforcement primarily in contract, tort, and trademark law (Tier Two). Third, state and local governments can prosecute fraudulent actors either under general consumer protection laws or

ness), available at http://www.law.harvard.edu/programs/olin_center/ (last modified Oct. 1, 2003) (click on discussion papers; scroll down to or click on 2002; click on #384).

4. Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225, 1286 (1997).

5. Much of the data contained within this Article was obtained via a series of interviews with industry *insiders* or participants. Based on preliminary data gathering, seven kosher supervising agencies (KSAs), ranging in size from small to large, and five other individuals otherwise connected to the kosher food industry (each fell into one or more of these categories: food scientist, kosher consumer watchdog, expert among kosher proxy users, attorney who prosecuted kosher fraud for the State) were approached to be interviewed. Due to the market dominance of several groups or individuals among many, a random selection likely would have produced skewed results. The agencies and individuals were chosen based on their ability to represent a variety of perspectives. Though it is always possible that the interviewees have their own biases, the diversity of opinions solicited aimed to minimize this risk. Representatives from four of the seven KSAs and four of the five selected other individuals were actually interviewed for a total of eight interviews. Together, the interviewees have spent over one hundred years working within or studying the kosher food industry. For anonymity reasons, these sources have been given credit for the appropriate information in a general manner. Inquiries about this information should be directed to the author, who has more information about the interviews, the methodology employed, and data gathered on file.

6. The term *kosher food industry* is used within this Article to refer to a collective group of individuals, organizations, and corporations, including: (1) manufacturers, wholesalers, retailers, caterers, and butchers engaged in the production and preparation of kosher food; (2) certification intermediaries, also known as kosher supervising agencies (KSAs); (3) consumer watchdog groups; and (4) individual consumers who intentionally set out to buy kosher food.

under special criminal and civil statutes, also known as kosher fraud statutes, that specifically protect consumers from fraud in the kosher food industry (Tier Three).

While one interesting question is how to understand, explain, and eventually harness the powers of the social norms that allow for robust Tier One enforcement,⁷ this Article primarily focuses on the often ignored flip side of this question: How should law (in this case Tier Three, which unlike Tier Two, leaves little room for opt out) best respond to these nonlegal schemes?

In an ideal world, there is a constant dialogue between law as an institution and the populace it purports to govern as the two attempt to find equilibrium.⁸ Changes in the law may upset the balance these private actors have established.⁹ At the same time, though, legal adaptations might be a necessary, or at least an appropriate, response to augment or counter the behavior of nonlegal systems.

The kosher food industry is at a crossroads of legal change since the kosher fraud statutes that comprise part of the Tier Three enforcement recently have been declared unconstitutional.¹⁰ Unfortunately, scholars studying these statutes and methods of solving the

7. Indeed this question has been the focus for much of the law and social norm movement. See ERIC A. POSNER, *LAW AND SOCIAL NORMS* 8 (2000) (positing that “many legal rules are best understood as efforts to harness the independent regulatory power of social norms”); Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1694 (1996) (arguing that “the lawmaker’s role is to find community norms, apply the structural test, and enforce the norms that pass the test”); Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2478 (1997) (“By focusing on how law can be used to regulate norms, the new deterrence scholarship can be used to identify morally acceptable and politically feasible alternatives to the severe punishments that dominate contemporary criminal law.”); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340-42 (1997) (listing recent studies of social norms and offering a theory for legal regulation of norms); Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California’s Carpool Lanes*, 75 IND. L.J. 1231 (2000) (demonstrating how legal rules can change norms about pollution).

8. For a discussion of how multitiered government levels have produced such a dialogue in the human rights context, see Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 249-53 (2001).

9. See CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 38 (1997) (describing “norm cascades” where a societal “tipping point” is reached and new norms emerge); POSNER, *supra* note 7, at 8.

10. See *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 432 (2d Cir. 2002) (invalidating the New York kosher fraud statute); *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1346 (4th Cir. 1995) (invalidating the Baltimore ordinance); *Ran-Dav’s County Kosher, Inc. v. State*, 608 A.2d 1353, 1366 (N.J. 1992) (invalidating the New Jersey regulations to the extent they imposed substantive religious standards for the preparation and maintenance of kosher foods). These decisions were based on the Establishment Clause of the First Amendment. U.S. CONST. amend. I; see also discussion *infra* Section III.C.2.(c).

Establishment Clause problem¹¹ have done so without consideration of the alternative enforcement schemes: non-specialized criminal prosecution, private legal enforcement, and nonlegal sanctions. The pressing question is not how the kosher fraud law should change to avoid constitutional quandaries, but more importantly, whether the statutes are necessary or useful within the realm of multitiered enforcement options; if not, what legal response could best augment the existing regime created by various private actors without accidentally undermining the incentives for and structure of the private ordering?

This Article offers a proposal to answer this question for the kosher food industry that more accurately reflects the strengths and weaknesses of the nonlegal systems policing the industry. More importantly, though, this Article's analysis of the methods through which the kosher food industry combats fraud and mistake offers suggestions for participants in other specialized food markets (such as organic, allergy-safe, halal, and nongenetically modified), as well as for consumers in general, who seek to balance nonlegal and legal protection mechanisms. Beyond these applications, the kosher model can help build a general theory or template for how tort and criminal law should respond to enhance the efforts of nonlegal sanctions, rather than change them, and whether and to what extent entire communities or industries should be able to opt out of tort and criminal enforcement.

Section II provides relevant background information concerning the kosher food industry. It defines key aspects of what it means for food to be kosher and describes the market for kosher food and the kosher certification intermediaries upon which consumers rely. Section III explains the three-tiered enforcement scheme that protects the consumers in this industry, and it presents an overview of the history, legal content, and constitutional challenges of the specialized

11. See Mark A. Berman, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 COLUM. J.L. & SOC. PROBS. 1, 28 (1992) (stating that although the Court has struggled to agree on a consistent interpretation of the Establishment Clause, kosher fraud statutes are a clear case of excessive entanglement of government and religion); Karen Ruth Lavy Lindsay, *Can Kosher Fraud Statutes Pass the Lemon Test? The Constitutionality of Current and Proposed Statutes*, 23 U. DAYTON L. REV. 337, 362-68 (1998) (also arguing excessive entanglement); Gerald F. Masoudi, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. CHI. L. REV. 667, 696 (1993) (proposing disclosure as a solution to the constitutional problem). *But see* Shelly R. Meacham, *Answering to a Higher Source: Does the Establishment Clause Actually Restrict Kosher Regulations as Ran-Dav's County Kosher Proclaims?*, 23 SW. U. L. REV. 639, 641 (1994) (arguing that protecting consumers from fraud is a secular purpose and fits within the principles of *Lemon*); Stephen F. Rosenthal, *Food For Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 GEO. WASH. L. REV. 951, 998-1004 (1997) (arguing non-endorsement); Catherine Beth Sullivan, *Are Kosher Food Laws Constitutionally Kosher?*, 21 B.C. ENVTL. AFF. L. REV. 201, 242-44 (1993) (noting that kosher fraud laws further a state interest).

kosher fraud statute.

Using the information provided in Sections II and III, Section IV offers an economic theory of what one would expect to see happen in the kosher food industry, given the enforcement system that exists, and indicates the degree to which industry field data substantiate the theory. Based on this analysis, Section IV proceeds to offer suggestions for how law should respond in the face of the nonlegal monitoring efforts and sanctions. This Section contains a proposal for the kosher food industry that focuses on voluntary information sharing, with the state serving as the coordination solution central bank, and then comments on the utility of the kosher disclosure statute, a new form of Tier Three enforcement that has replaced the kosher fraud statute in New Jersey.

Section V provides several applications for this analysis beyond the kosher food industry, particularly within the emerging markets for halal, organic, nongenetically modified, and allergy-safe foods, and more generally as a model for understanding consumer protection law. Since each subindustry is unique, there is no single legal response or solution to apply across the board; instead, this Article offers a tripartite approach for analyzing consumer protection laws in the context of the inherent theoretical tension these regulations present. This Section suggests that many consumer groups seeking federal or state assistance ought to be wary of governmental standard setting as a primary means for establishing and regulating private-market labeling. Instead, these groups might want to focus their energies on developing a strong legal framework that could support a private system of supervision and certification.

This Article concludes that preliminary efforts to discover the appropriate legal response to nonlegal monitoring, certifying, sanctioning, and information sharing in circumstances that warrant partial opt out, like the kosher fraud case study, suggest the need for a metatheory that merges tort and criminal law theories of public interest or social welfare policy with public choice and norm theory understandings of subsidization, consent, and opt out.

II. THE THREE CS OF KOSHER FOOD: CONTENTS, CERTIFIERS, AND CONSUMERS

What determines whether food is kosher? There are two approaches in answering this question, each correct in its own way. On one level, as a primary matter, food is kosher if it meets the standards that are laid out in the Hebrew Bible as the provisions of the Old Testament are interpreted by subsequent rabbinical authori-

ties.¹² These laws govern the nature of the food source as well as its preparation. Accordingly, kosher food is that food which has been prepared in accordance with the religious laws of *kashrus*.¹³

This raises the question how someone who observes the dietary laws of *kashrus* knows that the food she is eating is kosher. First of all, someone who seeks to eat only kosher food does not necessarily even know all of the complicated laws dictating what makes food kosher. Indeed, the vast majority of consumers who intentionally participate in the kosher food industry do not know the details of all the laws of *kashrus*. Furthermore, even if we imagine one who is knowledgeable about these complicated laws, our *source* of food is often a local supermarket or restaurant and before that, a processing plant. While the discovery of preservatives and the ability to ship food by rail and plane have expanded the opportunities for consumers of food, the industrial age has also complicated the decisionmaking

12. Orthodox Jews believe that at the time the Hebrew Bible (which consists of the five Books of Moses) was given on Mount Sinai (circa 1200 B.C.E.), Moses received both this written law and its interpretation instructions. See *Halakhah*, in 7 ENCYCLOPAEDIA JUDAICA 1161 (Keter Publ'g House Ltd. 1971). These instructions were transmitted orally from generation to generation as chronicled in Pirkei Avot ("Ethics of the Fathers"). *Id.* at 1162. Once invading enemies and exile threatened the Jewish people, this oral law was written down, so it would not be lost. Over the course of his lifetime (135-219 C.E.), Rabbi Judah ha-Nasi compiled and redacted the oral law in a codification known as the Mishnah. *Id.* at 1163. The Talmud is a written compilation of interpretations and syntheses of the Mishnah, presenting the Mishnaic text along with Rabbinical debates about its meaning that occurred between competing schools of thought in the years 220-470 C.E. *Id.* at 1163-64. Later generations of Rabbinical authorities would offer codifications of or issue *responsa* on Jewish religious and civil law. *Id.* at 1165. The most accepted, comprehensive Orthodox source of codified Jewish Law used by observant Jews today is the Shulhan Arukh (literally "Set Table"), which was written by Rabbi Joseph Caro in the 1560s and commented on by Rabbi Moses Isserles in the 1570s. *Id.* at 1166. The Shulhan Arukh is divided into four volumes: Orech Chaim (laws on prayer and holidays), Yoreh Deah (Jewish daily living—including charity, Torah study, and *kashrus*), Even Ha'ezer (marriage and divorce), and Choshen Mishpat (Jewish civil law). *Id.* Orthodox interpretation of Jewish law relies on a positivist framework; Rabbis do not make Jewish law. They find the relevant law, some would argue from "a brooding omnipresence in the sky," Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917), though more accurately described as the commandments from God contained within Biblical text itself (particularly Leviticus and Deuteronomy, though also from other portions of the five Books of Moses) and the Talmud. They rely on the teachings of prior rabbinical authorities, in order to apply the law to a given set of circumstances. See *Halakhah*, *supra*, at 1165.

13. The term *kashrus* (KAH-shrus) is derived from the same Hebrew root as the word kosher. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1233 (1986); see *Kashrut: Jewish Dietary Laws*, American-Israeli Cooperative Exchange, Jewish Virtual Library, at <http://www.jewishvirtuallibrary.org/jsource/Judaism/kashrut.html> (noting terms *kashrut* and *kosher* derived from Hebrew word "Kaf-Shin-Resh"). This is the Ashkenazic (Eastern-European Jewish) pronunciation of the word *kashrut* (KASHRUTE). THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1046 (2nd ed. 1987). For purposes of this Article, the Ashkenazic form of the word will be used, considering that is what the vast majority of kosher supervising agencies within the United States use. Interviews with various KSA representatives (Fall 2002) (for interview clarification see *supra* note 5).

process for kosher consumers. How can a consumer be certain that the food she eats is kosher if she is not able to observe most of the production process?

As a result of these difficulties, there is an industry of rabbinical institutions and rabbis who act as certifiers. For a fee, they observe the production process in order to ensure that the food is kosher. Consumers who seek out processed kosher food look for an identifying trademark or label from a certifier, such as an encircled K or U. Restaurants and other food establishments also must obtain certification and often literally receive a certificate that potential customers can see.

Without certification, consumers have no way of knowing if food actually is kosher or not. If kosher food is prepared in a manufacturing plant or restaurant, following all the laws of kashrus, but no certifier is there to observe it, is the food kosher at all? Technically, yes; but just like the falling tree in the forest that no one is around to hear, kosher consumers would have no way of knowing that the food is actually kosher. Effectively, then, for kosher consumers of 2003, what determines whether food is kosher is the existence (or lack) of certification by an appropriate person or institution. And so, a private subindustry of supervision and certification exists to signal to consumers what food is kosher.

But one cannot fully understand this supervision and certification subindustry without knowledge of what makes food kosher. Accordingly, this Section first presents a general overview of kashrus.¹⁴ The laws of kashrus can best be placed into three categories: (1) kosher versus nonkosher ingredients, (2) kosher preparation practices, and (3) impermissible combinations of food cooking and consumption. After explaining these three categories in some detail, this Section then discusses the supervision and certification industry, which consists of parties educated about the laws of kashrus who obtain insider access to the food production process and offer consumers more certain answers to the question whether food is kosher. Finally, since this Section lays the foundation for a discussion about how the various legal and nonlegal remedies protect consumers, it concludes with a description of the various consumers who participate in the market for kosher food.

14. This Article presents a general overview of principles and rules that are mostly, though not universally, accepted within the Orthodox community. Questions of kashrus are not always black and white, and one should be cautious not to confuse the religious significance placed on the laws with the notion that the laws themselves are rigid in their application. Given the context of this *primer* on kosher, some oversimplifications are inevitable. For a more complete look at kashrus, see RABBI E. EIDLITZ, IS IT KOSHER? ENCYCLOPEDIA OF KOSHER FOODS FACTS & FALLACIES (1992).

A. *Defining Kosher*

The Hebrew word *kasher* (kah-SHARE)—or *kosher*—means fit or proper.¹⁵ *Kosher* is a religious term of art that is used to describe a range of ritualistic objects, activities, or even a state-of-being.¹⁶ *Kosher*, meaning acceptable or appropriate, has even crept into the English lexicon.¹⁷

Food is *kosher* when it meets the strict dictates of the laws of *kashrus*.¹⁸ While some people have attempted to offer reasons for these laws, such as the explanation that a *kosher* diet is healthier,¹⁹ the laws of *kashrus* are considered laws for which no explanation is offered or should be needed.²⁰ As such, this Article makes no effort to explore these after-the-fact justifications and simply presents an overview of the laws of *kashrus* to introduce what the *kosher* food industry is and how it functions.

The laws of *kashrus* require that *kosher* food: (1) come from a proper source—for example, meat from some animals, such as pork, is inherently non*kosher*,²¹ (2) be prepared in a specific manner—for example, animals must be slaughtered in a particularized manner, and (3) not be combined improperly with food that might otherwise be considered *kosher*—for example, combining meat and milk.²² While the public is more aware of the rules in the first and third categories (no pork, no cheeseburgers, etc.), the second category is actually the most prohibitive, since it prevents equipment and utensils

15. SEYMOUR E. FREEDMAN, *THE BOOK OF KASHRUTH: A TREASURY OF KOSHER FACTS AND FRAUDS* xvii (1970).

16. *See id.*

17. *Kosher* is defined by Merriam-Webster as: “[S]anctioned by Jewish law; *especially*: ritually fit for use <*kosher* meat> . . . selling or serving food ritually fit according to Jewish law <a *kosher* restaurant> . . . being proper, acceptable, or satisfactory <*kosher* funding>.” Merriam-Webster OnLine (2002), at <http://www.m-w.com> (last visited Oct. 9, 2003).

18. This Article will identify the laws of *kashrus* in accordance with the Shulhan Arukh, see *supra* note 12 and accompanying text, and RABBI YACOV LIPSCHUTZ, *KASHRUTH: A COMPREHENSIVE BACKGROUND AND REFERENCE GUIDE TO THE PRINCIPLES OF KASHRUTH* (1988).

19. *See* Beth Laski, *Keeping Kosher Becomes Chic: Demand for Quality Food Triggers Marketing Boom*, L.A. DAILY NEWS, Apr. 4, 1993, at L14; *Jewish Mother’s Chicken Soup Decides to Go Kosher*, ST. PETERSBURG TIMES, Nov. 9, 1987, at 10E (reporting that “a growing number of non-Jews concerned about health and nutrition” are eating *kosher*). *But see* Berman, *supra* note 11, at 5 (“[T]he Divine Torah did not come to heal bodies and seek their physical health, but to seek the health of the soul and to heal its diseases . . .”) (quoting ISAAC ABRAVANEL, *VAYIKRA [(COMMENTARY ON) LEVITICUS] 65*).

20. LIPSCHUTZ, *supra* note 18, at 16 (describing the commitment to *kashrus* as purely a matter of faith). For a presentation of perspectives on *kashrus* by various Jewish scholars of the past and present, see IRVING WELFELD, *WHY KOSHER? AN ANTHOLOGY OF ANSWERS* (1996).

21. *Leviticus* 11:3-8.

22. *Kosher Consumer’s Union, Mini Course in Kashrus & the Basic Laws of Kashrus*, at <http://www.kosherconsumer.org/course.htm>. (last visited Nov. 3, 2003).

from being used to prepare both kosher and nonkosher foods. Outlines of these rules will be detailed below.

1. *Kosher Food Sources and Ingredients*

Contrary to popular belief, most food in its purest form is kosher. Grains, vegetables, fruit, and nuts are all inherently kosher.²³ The main limitations from the laws of kashrus apply to animal-sourced food. The animal kingdom is divided into three acceptable categories: meat, poultry, and fish. Within these groupings, there are different restrictions regarding (1) which animals are permissible, (2) which parts of permissible animals may not be consumed at all, and (3) what methods of preparation are required. The first two types of restrictions will be discussed briefly here, while the latter is included in Subsection II.A.2 below.

(a) *Mammals*

The laws of kashrus limit the type of animal from which flesh (meat) can be eaten. In order for meat from a mammal to be kosher, the animal must have both split hooves (artiodactyls) and chew its cud (ruminants).²⁴ Kosher dairy products, such as milk and cheese, must also come from a kosher animal-source.²⁵ The cow is the most common source of kosher meat. Some other animals that fit in this category are goats, deer, sheep, giraffe, and bison.

The Bible identifies four animals that meet only one of the two necessary criteria, and, thus, no meat from one of these animals may be considered kosher.²⁶ These animals are the camel, hyrax, hare (all lack split hooves), and most famously, the pig (does not chew its cud).²⁷ As a result, no method of preparation can render pork kosher. Animals with neither sign, such as donkeys and horses, are also not

23. *But see* EIDLITZ, *supra* note 14, at 195-97 (detailing various inspection requirements for vegetables to ensure that no insects remain). Additionally, other non-kashrus restrictions may limit the ability to eat food from the ground, such as requirements for tithing and a sabbatical year.

24. *Deuteronomy* 14:3-8; *Leviticus* 11:3; LIPSCHUTZ, *supra* note 18, at 17-18; *Yoreh Deah*, in SHULHAN ARUKH ch. 79 (Hebrew book utilized by the author.).

25. Modern rabbinic authorities disagree whether a Talmudic restriction prohibiting the consumption of milk produced outside the presence of an observant Jew (to prevent mixing the milk of nonkosher animals with milk from kosher animals) still applies within the United States, where milk production is heavily regulated to avoid impermissible adulteration. LIPSCHUTZ, *supra* note 18, at 54-56. Milk that has been supervised is known as *cholov yisrael*; unsupervised milk is called *cholov stam* (ordinary milk). Interviews with various KSA representatives (Sept. – Oct. 2002) (for interview clarification see *supra* note 5); see Rabbi Moshe Heinemann, *Cholev Yisroel: Does a Neshama Good*, KASHRUS KURRENTS, The Star-K Online, at <http://www.star-k.org/kashrus/kk-issues-cholovYisroel.htm> (last visited Nov. 3, 2003).

26. *Leviticus* 11:4-7.

27. *Id.*

kosher. In addition, marine mammals, like porpoises and whales, are not kosher.

Some portions of otherwise kosher mammals are also forbidden. This includes the sciatic nerve and its attached blood vessels, some forbidden stomach fats, and also any blood.²⁸ Due to the difficulty in extracting the sciatic nerve and the greater number of blood vessels in the hind quarters of most animals, many kosher butchers only use the top half of the mammal.²⁹ Accordingly, kosher steaks are typically cut from the shoulder, rather than the nonkosher short loin, from which T-bone steaks customarily come. In order to avoid eating any blood, which is impermissible, kosher meat must be soaked and salted before it can be consumed.³⁰ This procedure will be discussed below.

(b) Poultry or Fowl

Kosher poultry is limited to domestic fowl.³¹ Scavenging birds, such as eagles or ravens, are not permissible sources of food.³² Due to historical difficulties in applying the standard of what makes poultry kosher, rabbinic authorities declared that permitted fowl would be limited to a list of birds traditionally known to be kosher.³³ The most well-known and consumed from this list are chicken, turkey, goose, and domestic duck.³⁴ Since there is no definitive tradition about pheasant, wild ducks and geese, or pigeons, they may not be eaten.³⁵ Like in the context of beef, the blood from poultry is not considered to be kosher.³⁶

(c) Fish, Marine Life, and Invertebrates

Any fish that has both fins and scales is kosher.³⁷ Thus, the list of permissible fishes is quite lengthy; it includes tuna, salmon, trout, halibut, flounder, and sole, to name only a few popularly consumed types.³⁸ Examples of nonkosher fishes and marine life are catfish,

28. *Genesis* 32:32; *Leviticus* 3:17, 7:26-27; LIPSCHUTZ, *supra* note 18, at 26-30; SHULHAN ARUKH *supra* note 24, at ch. 65.

29. LIPSCHUTZ, *supra* note 18, at 29-30.

30. *Id.* at 30-34; SHULHAN ARUKH, *supra* note 24, at chs. 69-78.

31. *Leviticus* 11:13-19; LIPSCHUTZ, *supra* note 18, at 18-19; SHULHAN ARUKH, *supra* note 24, at ch. 82.

32. *Leviticus* 11:13-18.

33. LIPSCHUTZ, *supra* note 18, at 18-19; SHULHAN ARUKH, *supra* note 24, at ch. 82.

34. OK Kosher Certification, *Meat, Dairy, and Pareve*, at <http://www.okkosher.com/Content.asp?ID=63> (last visited Nov. 1, 2003).

35. LIPSCHUTZ, *supra* note 18, at 19.

36. *Id.* at 30; SHULHAN ARUKH, *supra* note 24, at ch. 77.

37. *Deuteronomy* 14:9-10; *Leviticus* 11:9-12; LIPSCHUTZ, *supra* note 18, at 47; SHULHAN ARUKH, *supra* note 24, at ch. 83.

38. For a more comprehensive list, see LIPSCHUTZ, *supra* note 18, at 142-58.

blowfish, eels, rays, and sharks.³⁹ Some fish, like swordfish and sturgeon, have scales that are embedded in the skin. Many orthodox authorities deem these fish not kosher.⁴⁰

Shellfish and crustaceans, such as lobsters, shrimp, and oysters are not considered kosher.⁴¹ Insects, creepy-crawlers, arthropods generally, or other invertebrates are not kosher either.⁴² Some types of non-animal source food, such as leafy vegetables, must be carefully inspected to ensure that no insects remain.⁴³

2. *Kosher Food Preparation*

The most complicated laws of kashrus dictate how food that is source-based, or ingredient, kosher must be prepared—or more importantly, not prepared—in order to render the food kosher. These rules can best be sorted into two unrelated groupings: (1) those that apply to the preparation of animal-sourced food, and (2) those that apply rules of absorption and transference to cooked food and the cooking utensils employed.⁴⁴ This latter category is the most complicated and can act as the most restrictive of all the laws of kashrus. Again, what follows is merely a brief overview to put the need for supervision and certification in its proper context.

(a) *Preparing Animal-Sourced Food*

Kosher meat and poultry must be ritually slaughtered by a trained slaughterer called a shochet (SHO-chet), who is required to sever the animal's trachea and esophagus in one motion.⁴⁵ This method ensures that the animal's death is as quick as possible, and that the maximum amount of blood drains from the animal.⁴⁶ The shochet uses a special sharp knife that must be free from all nicks to meet these two criteria and to minimize the animal's pain.⁴⁷

If a kosher animal, such as a cow or deer, dies on its own or is killed in any other manner (e.g., by rifle), its meat may not be consumed.⁴⁸ Once the animal is slaughtered, its organs must be free

39. *Id.* at 158-60.

40. *Id.* There is some debate over whether these fish possess the appropriate signs.

41. *Leviticus* 11:20-31; SHULHAN ARUKH, *supra* note 24, at chs. 84-85.

42. *Leviticus* 11:20-31.

43. See EIDLITZ, *supra* note 14, at 195-97. Some rabbis recommend avoiding vegetables that present a near certainty that insects cannot be removed, such as brussel sprouts.

44. There are also laws prohibiting the consumption of various foods (including, but not limited to, bread and wine) prepared by non-Jews. LIPSCHUTZ, *supra* note 18, at 67-70, 74-76; SHULHAN ARUKH, *supra* note 24, at chs. 112-13.

45. SHULHAN ARUKH, *supra* note 24, at ch. 20.

46. *Id.* at chs. 6-10.

47. *Id.*

48. *Leviticus* 22:8.

from defects.⁴⁹ Perforations in vital organs, such as the lungs, render the animal nonkosher.⁵⁰ Within seventy-two hours of the slaughter, the meat must be soaked and salted to remove the blood.⁵¹

(b) *Food and Utensil Absorption/Transference*

For the purposes of the laws of kashrus, hot food is thought to be absorbed by the utensil in which it is cooked.⁵² As a result, utensils take on the character of the food placed in or upon them.⁵³ Likewise, food takes on the character of the utensil.⁵⁴ This is true for cutlery, pots, pans, ovens, and other cooking appliances. Think of what happens when hot spaghetti and tomato sauce are placed in a plastic container; the container will stain as the food is absorbed into the utensil. Or imagine that seafood is baked in an oven. Even a chocolate cake baked immediately afterwards in the same oven will absorb some of that flavor.

There are special procedures that allow the nonkosher character to be *removed* from some utensils, based on the utensil material, under the theory that the method of restoration should mirror the method of absorption. Thus, since it is the combination of heat and food that causes the initial absorption or transference, heat must be employed to reverse these effects. The two main procedures for making a nonkosher utensil kosher, or in other words, kashering (KAH-share-ing), are allowing the utensil to be surrounded by scalding water (used for cutlery and pots) or taking a blow torch to burn out the absorbed material (used for ovens).⁵⁵ Only some materials, like stainless steel, can be kashered.⁵⁶ Wood and ceramics can never be kashered.⁵⁷ This is based on a traditional understanding that some materials either never release what they have absorbed or cannot safely be heated to an appropriate temperature to do so.⁵⁸

Due to these rules, food that is kosher by the standards described above—for example, vegetables—can be rendered nonkosher by virtue of how it is prepared. Imagine that carrots are cooked in a pan

49. See LIPSCHUTZ, *supra* note 18, at 22.

50. SHULHAN ARUKH, *supra* note 24, at chs. 29-60. The term “glatt kosher” refers to lungs that have been tested to make sure they have no impermissible adhesions. LIPSCHUTZ, *supra* note 18, at 22-24. This term has been misused to mean *extrakosher*. See *id.* at 24. For example, the phrase *glatt kosher fish* makes no sense; fish do not have lungs.

51. SHULHAN ARUKH, *supra* note 24, at chs. 69-78.

52. *Id.* at chs. 87-111; LIPSCHUTZ, *supra* note 18, at 43-44.

53. SHULHAN ARUKH, *supra* note 24, at chs. 87-111.

54. *Id.*

55. EIDLITZ, *supra* note 14, at 68-71, 77-78.

56. *Id.* at 68.

57. *Id.* at 78.

58. See, e.g., Halacha Yomit, *Different Methods of Kashering Utensils*, at <http://www.torah.net/sites/halachayomit/hagala.html> (last visited Nov. 3, 2003).

that once cooked food that does not meet the laws of kashrus—for example, pork. While cooking hot pork, that pan absorbed the nonkosher character of the meat. Then, the heat from cooking the carrots releases that character into the vegetable and the pan transfers its nonkosher nature into them. Given the rules of absorption and transference, most hot food prepared in a nonkosher kitchen would not be kosher unless it happened to be prepared with utensils, pots, pans, and appliances that had either never been used or had only been used to prepare kosher food.⁵⁹ The consequences of absorption and transference render many foods nonkosher even though they otherwise contain purely kosher ingredients.

While the rules of absorption and transference apply to hot food, there are also several limitations that prevent the use of cold nonkosher utensils to prepare or contain cold kosher food. First, the nonkosher utensil must be washed between usage, otherwise it may still retain some nonkosher food matter.⁶⁰ Beyond that, similar rules of absorption also apply to utensils that come into contact with cold, sharp, or spicy foods, such as onions, garlic, lemons, or pickles, because those foods are thought to transfer their flavors even when cold.⁶¹

3. Impermissible Food Combinations

Kashrus prohibits one from cooking or eating meat and dairy products together.⁶² This can affect food cultivation as well; for example, many Orthodox Jews will not consume cheese made with animal-sourced rennet.⁶³ Some Jews customarily wait for a period of time of one, three, or six hours, depending on their country of origin, after eating meat before eating dairy again.⁶⁴ Similar customs impose

59. See EIDLITZ, *supra* note 14, at 67-68; LIPSCHUTZ, *supra* note 18, at 43-44. Implements and utensils that have been used within twenty-four hours are treated differently than those that have not in certain contexts. EIDLITZ, *supra* note 14, at 77-78. Thus, if someone makes an error, he should contact a rabbi and ask to see what leniencies might apply and not simply rely on a pronouncement from a general book on kashrus. See *id.* at 68.

60. See EIDLITZ, *supra* note 14, at 68.

61. *Id.*; SHULHAN ARUKH, *supra* note 24, at ch. 96.

62. *Exodus* 34:26; SHULHAN ARUKH, *supra* note 24, at chs. 87-97. For an excellent descriptive pictorial guide to illustrate these principles, see EHUD ROSENBERG, BA'SAR B'CHALAV (1988) (written in Hebrew).

63. LIPSCHUTZ, *supra* note 18, at 56-57. Merriam-Webster defines rennet as: “[T]he contents of the stomach of an unweaned animal and especially a calf . . . the lining membrane of a stomach or one of its compartments (as the fourth of a ruminant) used for curdling milk; also: a preparation of the stomach of animals used for this purpose.” Merriam-Webster OnLine (2002), at <http://www.m-w.com> (last visited Oct 9, 2003).

64. SHULHAN ARUKH, *supra* note 24, at ch. 89.

waiting periods for eating meat after one has consumed hard cheeses too.⁶⁵

Foods that are neither meat nor dairy are considered to be pareve or parve (PAH-rev).⁶⁶ Fruits, vegetables, and grains are all pareve. Furthermore, even though they are animal-sourced, honey, fish, and eggs are all pareve.⁶⁷

The rules of absorption and transference described above also apply to give utensils a *meat* or *dairy* character. Kosher meat may not be cooked in a pot that has already been used to cook dairy food, even if all the food in question is kosher by its ingredient nature.⁶⁸ Accordingly, those who strictly follow the laws of kashrus in their kitchens have two separate sets of dishes, pots, pans, and flatware: one for dairy and one for meat.⁶⁹

B. *The Supervision and Certification Industry*

Prior to the twentieth century, Jews could observe the dietary laws of kashrus without much difficulty, due to the agrarian nature of society. Vegetables and grains were grown locally and sold in their original form. Tight-knit communities relied on a local shochet to slaughter meat and poultry according to the dictates of kashrus.⁷⁰ Dairy products were made from milk that was either obtained from the family-owned cow or from a local Jewish milkman.⁷¹ While self-reliance posed some difficulties for Jewish communities, they had the power to control the steps of food production to ensure that all the food they consumed was kosher.

The world has changed between then and now. Food is a multibillion dollar industry, and the kosher food industry is just one segment of it. Most of the food eaten by consumers in 2003 has been processed, refined, or canned; most of it has crossed many state lines and even some international borders before arriving at local groceries, supermarkets, catering halls, hotels, and restaurants. In some ways, these technological advances have allowed consumers to improve their diets by introducing greater dietary variety while eliminating food-related health hazards. At the same time, changes in the food industry have created other health risks; within the United States, the threat of obesity and poor nutrition has replaced malnutrition. None-

65. See LIPSCHUTZ, *supra* note 18, at 43.

66. *Id.* at 44.

67. It is customary to eat fish and meat on separate plates with separate utensils. *Id.* at 50.

68. *Id.* at 43.

69. *Id.* at 43-44.

70. *Id.* at 21.

71. Though fictitious, the community portrayed in "Fiddler on the Roof" bears strong resemblance to many Jewish communities of that era. FIDDLER ON THE ROOF (MGM 1971).

theless, food consumers—a group that includes basically every member of society—can overcome this *burden* of success through educated, health-conscience decisionmaking.

These societal changes, though, present a hurdle for those who wish to eat a kosher diet.⁷² A consumer has no way of knowing exactly what ingredients are contained in the food she buys. Though general consumer protection regulations aid the kosher consumer, they fall short of providing the information consumers need to know. For example, current federal labeling requirements do not require that all ingredients be identified.⁷³ And even if all ingredients are known, the use of industrial-sized equipment in plants creates a litany of transference or absorption kashrus difficulties—both between nonkosher and kosher products as well as between dairy and meat products. To give one specific illustration, if a company makes one line of products that are not kosher, no other food product made with the same machinery is kosher either. When that nonkosher food product is used as an ingredient in yet another food product at a different company's plant, it can render any food coming out of that plant nonkosher as well.

Given these increasing difficulties, one might think that the modern kosher consumer is out of luck. The food industry offers greater variety, yet the increased reliance on mass production undercuts the kosher consumer's options drastically. Fortunately for the kosher consumer, a subindustry of kosher supervision and certification has emerged to allow these consumers access to a greater amount and variety of food. This Section details the who, what, and how of kosher certification.

1. *Who Certifies Kosher Food?*

Individual rabbis or rabbinical organizations enter into agreements with the owners of local food establishments as well as national food producers and processors.⁷⁴ In exchange for a fee and access to the production process, the rabbi or organization will supervise the process and certify that the food meets the requirements of kashrus.⁷⁵ To avoid the temptation or appearance of corruption, Jewish law mandates that the certifier not have an interest or stake in the business being certified.⁷⁶

72. See SAUL BERNSTEIN, *THE RENAISSANCE OF THE TORAH JEW* 183-85 (1985) (describing the difficulties caused by the industrialization of food production).

73. Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. §§ 342-343 (2002) (defining "adulterated" and "misbranded" food).

74. Interviews with various KSA representatives (Sept.-Oct. 2002) (for interview clarification see *supra* note 5).

75. *Id.*

76. *Id.*

Whether the food actually is kosher is determined based on the numerous requirements generally outlined above and several others not detailed. Food may or may not be kosher, and consumers have no ability to discern the truth. The supervisors and certifiers offer useful information to consumers as they declare that, based on their own observation of the food production and preparation process, the food meets the dictates of the laws of kashrus. Through various symbols, letters, or actual certificates, certifiers signal to consumers that they deem food kosher for consumption.

Though there are over three hundred registered kashrus symbols used by kosher supervision agencies (KSAs) in the United States,⁷⁷ several nationwide certifiers dominate the certification of manufactured food. In some local markets, many rabbis and organizations compete for the ability to supervise and certify retailers who sell nonpackaged food—including restaurants, bakeries, caterers, and butcher shops.⁷⁸ In other regions, one person or one organization monopolizes the supervision and certification process.⁷⁹ The Section that follows explains how the symbols operate, which organizations play a significant role in shaping the supervision and certification landscape, what the certifiers actually do to ensure that the food is kosher, and the role of competition among certifiers.

(a) *Identifying Organizations and Symbols*

Most KSAs have registered their trademarks with the United States Patent Office;⁸⁰ the letter K, which appears on some products, cannot be trademarked and does not represent any specific KSA. The heavy-hitter in the supervision industry is the Kashruth Division of the Union of Orthodox Jewish Congregations of America, a nonprofit organization that offers a host of Jewish communal services.⁸¹ This organization is better known by the name of its registered trade-


77. See *Who's Who in Kosher Supervision?*, KASHRUS MAG., Nov. 1993, at 30, 30-42 [hereinafter *Who's Who, Nov. 1993*] (publishing a thirteen-page guide of 151 kosher supervision services worldwide); *Who's Who in Kosher Supervision?*, KASHRUS MAG., Sept. 1990, at 26, 26-32 (publishing a seven-page guide of the ninety-five acceptable Kosher supervision services worldwide). The guide not only lacked the endorsement of any of the symbols, it provided the following disclaimer: "Some of the [supervision services] are not relied upon by most of the kosher world. Consult your rabbi for which symbols you should choose." *Id.*

78. Berman, *supra* note 11, at 12.

79. Interviews with a KSA representative and market watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

80. Interview with a KSA representative (Fall 2002) (for interview clarification see *supra* note 5).

81. Orthodox Union, *About the Orthodox Union*, at <http://www.ou.org/about/ou.htm> (last visited Nov. 1, 2003). Some representative OU divisions are: the National Conference of Synagogue Youth, the Institute for Public Affairs, and the National Jewish Council for the Disabled. *Id.* For more information about the OU, see <http://www.ou.org> (last visited Nov. 1, 2003).

mark, the OU, which appears as .⁸² In the early 1920s, attempts to provide kosher endorsement were simply that—endorsements.⁸³ Some advertising agencies seeking Jewish consumers for the firms they represented would advertise that products sold were kosher.⁸⁴ It was in this climate that the OU, which avoided entanglement with kashrus endorsement, first campaigned for kosher fraud statutes.⁸⁵ Recognizing that forcing kashrus conformity would be futile, though, the OU decided to provide supervision of kosher products as a non-profit public service.⁸⁶

The OU introduced its supervision and certification program in 1924.⁸⁷ Roughly seventy-five percent of the packaged kosher food found today on supermarket shelves is certified by the OU and bears its signature trademark.⁸⁸ A market study approximated that nearly one half of the products on supermarket shelves in the northeastern United States are certified kosher.⁸⁹ While these are loose estimates, it follows that in some regional markets, the OU certifies at least one third of the items one would find on any given shelf of a supermarket!

Combined with the OU, three other KSAs dominate the supervision and certification industry. The three other largest certifiers are the Organized Kashrus Laboratories (OK), Star-K Kosher Certification, and KOF-K Kosher Supervision. The OK began in 1935,⁹⁰ the Star-K, based in Baltimore, in 1947,⁹¹ and the KOF-K, which oper-

82. EIDLITZ, *supra* note 14, at 21.

83. BERNSTEIN, *supra* note 72, at 184.

84. *Id.* at 184-85.

85. *Id.* at 185.

86. *Id.* Interestingly, the OU first planned to fund the supervision itself, rather than by charging clients, to avoid any conflict of interest. *Id.* Now, it might be more accurate to say that the kashruth division funds the majority of the other OU divisions.

87. *Id.* at 185-86. See also Orthodox Union Department of Public Relations, *New Company and Plant Certifications Solidify Orthodox Union as Leader of the Kosher World* (Jan. 17, 2001), at <http://www.ou.org/oupr/2001/ouko01.htm> [hereinafter *Plant Certifications*].

88. *Plant Certifications*, *supra* note 87. OU Executive Rabbinic Coordinator Rabbi Moshe Elefant explained:




“Anytime you find a product that has a certification other than the OU on it, chances are that at least three of the ingredients that went into the final product were OU certified. For example, if you buy a chocolate chip cookie certified by another company, in all probability the vanilla flavoring, the chocolate chips, the raisins, the flour and the shortening have been certified by the OU.”

Id.

89. Sue Fishkoff, *Some Food for Thought: Kosher Is Latest US Fad*, JERUSALEM POST, Jan. 26, 1993, at O7 (citing Menachem Lubinsky of Integrated Marketing Communications, which publishes the kosher trade newspaper for the kosher food industry). This organization is discussed *infra* at Section II.B.2.(b).

90. OK Kosher Certification, OK In Brief, at <http://www.okkosher.com/Content.asp?ID=2> (last visited Oct. 10, 2003).

91. Avrom Pollak, *A 25 Year Retrospective on Kashrus Kurrents*, at <http://www.star-k.org/kashrus/kk-pres-kkretro.htm> (last visited Oct. 10, 2003). See generally Star-K Kosher

ates from New Jersey, in 1968.⁹² The respective symbols these organizations use are , , and . According to some estimates, these organizations (the Big Four) certify ninety percent of the kosher products on the market.⁹⁴

Other certifiers tend to be more regionally limited in scope. For example, consumers in the Midwest are more likely to rely upon the trademark of the Chicago Rabbinical Council, which appears as the letters cRc in a triangle.⁹⁵ North of the border, one would find the letters COR in an oval, indicating the supervision and certification of the Kashrus Council of Canada.⁹⁶ Some certification symbols show greater creativity in identifying their issuers; the Atlanta Kashruth Commission declares food kosher through the use of a peach containing the AKC initials.⁹⁷

Because regional plants and distributors are constantly expanding to new markets, consumers in any of those locations may find packaged products certified by any one of a great number of national, regional, or local supervisors and certifiers. As a result, an educated consumer must either commit scores of symbols to memory, bring a list of the symbols to the grocery store along with his or her shopping list, or simply rely on a few of the more commonly known ones.

In addition, trademarks and other kosher certification symbols do not perform purely binary tasks delineating food as kosher (and through the absence of such symbols indicate nonkosher food). The certification symbol not only conveys the information about the KSA or individual certifying the food, but may also include more specific forms of notice to consumers.


Some of the more common pieces of information that organizations may provide include: The word *pareve*—occasionally identified with the letter p—can be used to identify the neutral category of food that is considered neither dairy nor meat.⁹⁸ However since the letter P is more commonly used to depict food that is kosher for Passover,


Certification, Food Industry, at <http://www.star-k.com/industry.htm> (last visited Oct. 10, 2003).


92. Kof-K Kosher Supervision, Home Page, at <http://www.kof-k.com/index2.html> (last visited Oct. 10, 2003).

93. *Who's Who*, Nov. 1993, *supra* note 77, at 30.

94. Interviews with various KSA representatives (Fall 2002) (for interview clarification see *supra* note 5).

95. *Who's Who*, Nov. 1993, *supra* note 77, at 32 (,).

96. *Id.* at 40 (); see also Kosher Supervision Guide, at <http://www.kashrusmagazine.com> (last visited Dec. 9, 2003).

97. Atlanta Kashruth Commission, *Kosher Symbols*, at <http://www.kosheratlanta.org/koshersymbols.htm> (last visited Nov. 3, 2003) (,).

98. Interview with a KSA representative (Fall 2002) (for interview clarification see *supra* note 5).

many KSAs prefer to affix the *pareve* tag next to their mark to avoid confusion.⁹⁹ KSAs may employ the letter D or word *dairy* to identify foods that are considered dairy under the laws of kashrus. Foods that contain meat products may have symbols that indicate meat as well.¹⁰⁰ Some KSAs also use DE to identify a nondairy food product produced using equipment that has been previously utilized to manufacture dairy products.¹⁰¹ Currently, neither the tags themselves nor the nature of their usage is standardized between competing KSAs.

(b) *What Certifiers Do*

Certifying organizations are the eyes and ears of the kosher consumer. They open up the otherwise closed food production and preparation processes, translating access into a stamp of approval. Yet, the certification process is not an easy one. Several steps must be taken from the time a manufacturer, restaurant, or bakery determines that it wants to have its food deemed kosher before it may retail kosher food to consumers.

At this point, it is important to identify a difference between food that is sold to consumers in packaged forms and food that is not. The former category refers to food typically found on supermarket shelves, and the various KSA symbols of kosher certification ordinarily appear on the packaging or label. The latter includes food sold at bakeries, restaurants, and take-out stores. A letter of certification or an actual certificate is usually on the premises at the establishment that sells such kosher food. Many KSAs, including the Big Four, supervise and certify both manufactured or processed food as well as food establishments.¹⁰²

In most cases, the food manufacturer initiates the supervision and certification process.¹⁰³ Sometimes, the desire for kosher certification is the response to direct appeals from consumers. In other instances, the manufacturer of a vertically integrated food product will approach another one *lower* on the food chain, so to speak, since it cannot gain certification unless the earlier manufacturer does as well. Kosher certification proves profitable for many manufacturers because the increased sales offset any costs associated with the certifi-

99. *Id.*

100. *Id.*

101. *Id.* Food made with *dairy equipment* may not be eaten with a meat product. Some labels identify dairy that is *cholov yisrael* as opposed to *stam*. See Heinemann, *supra* note 25.

102. Interviews with various KSA representatives (Fall 2002) (for interview clarification see *supra* note 5).

103. *Id.*

cation process.¹⁰⁴ On occasion, a certifier may initiate contact; the OU and many others, however, do not solicit clients.¹⁰⁵

Once contact is made between certifier and manufacturer, the certifier must don its investigator hat to determine whether certification is a possibility. The manufacturer must supply detailed lists of all ingredients in a product (even those that are inert), all the cleaning agents used on machinery, all the steps of the manufacturing process (including suppliers), and all other products produced on the premises.¹⁰⁶ Certification requires tracing the ingredients and identifying the original food source.¹⁰⁷ Food and Drug Administration ingredient regulations are too lax for certifiers to be able to rely upon them because “artificial flavors” or “preservatives” are broad categories that require greater investigation.¹⁰⁸ In addition, certifiers inspect hygiene, as insects can contaminate food, rendering it nonkosher.¹⁰⁹

Once the investigation is complete, the certifier can either agree to supervise and certify the product, determine that certification is not possible, or require the manufacturer to make certain changes in ingredients or processes before certification.¹¹⁰ Assuming that certification is a possibility, the certifier will enter into a contract with the manufacturer.¹¹¹ This contract specifies that the manufacturer may not change ingredients, suppliers, or production processes without written consent of the certifier.¹¹² In addition, the agreement spells out the amount of on-plant supervision that will be necessary.¹¹³ The

104. See Y. Levy, “Kosher Brands” Have Added Value, *Experts Say*, KOSHER TODAY, Sept. 2001, at 1, available at <http://www.koshertoday.com/kosher%20today%20archives/2001/0901/All%20Text%20For%2092001.htm> (last modified Dec. 28, 2001); see also Benjamin N. Gutman, *Ethical Eating: Applying the Kosher Food Regulatory Regime to Organic Food*, 108 YALE L.J. 2351, 2362 (1999) (noting that “[t]he market for kosher food is . . . hot” with some estimating “the industry to be as large as \$47 billion a year”); KosherQuest, Reliable Kosher Symbols, at http://www.kosherquest.org/html/Reliable_Kosher_Symbols.htm#KOSHER%20CERTIFICATION%20INTRODUCTION (last modified Mar. 5, 2001) (stating that “[t]he cost of certification to the manufacturer is minimal” within the Kosher Certification Introduction).

105. Interviews with various KSA representatives and a consumer watchdog (Fall 2002) (for interview clarification see *supra* note 5). This does not mean that the KSAs do not advertise in any manner. The larger KSAs have booths at Kosherfest and the Kosher Trade Show, which may act as a form of “implied solicitation.”

106. EIDLITZ, *supra* note 14, at 7.

107. *Id.* at 8.

108. The FDCA (and section 409 particularly) is aimed at general safety and the prevention of adulterated food products. Federal Food, Drug, and Cosmetic Act (FDCA) § 409, 21 U.S.C. §§ 342-343 (2002). Thus, the imprecision of the regulations is related to its primary purpose. See *Les v. Reilly*, 968 F.2d 985, 986 (9th Cir. 1992) (finding that the FDCA “is designed to ensure the safety of the food we eat by prohibiting the sale of food that is ‘adulterated’”).

109. EIDLITZ, *supra* note 14, at 8.

110. See *id.*

111. *Id.*

112. *Id.*

113. See *id.*

KSA will pay a qualified inspector to make continual visits to ensure that the manufacturer is complying with the original agreement, and that the food produced is kosher.¹¹⁴

2. *The Role of Competition and Policing Within the Certification Industry*

(a) *KSA Competition*

KSAs charge fees in order to certify that food is kosher.¹¹⁵ Usually the size of the fee is a function of the cost of on-site inspection.¹¹⁶ At or below cost certification may be available when the facility being certified is a nonprofit, such as a nursing home or community center that provides meals.¹¹⁷ In rare instances, the fee may be a percentage of product profits.¹¹⁸ Though the largest organizations in the supervision and certification industry are often nonprofits and may be involved in providing services beyond kosher food certification, the KSAs are still driven by the desire to run efficiently.

In some regional markets, competition between KSAs is fierce. For example, a restaurant owner in the New York metro area has more than a dozen choices of organizations or individuals ready to certify the kashrus of the food in her establishment. In contrast, particularly in regions with significantly fewer kosher consumers, a kosher certifier may have either a real or virtual monopoly due to a lack of qualified and available individuals or organizations to serve as supervisors and certifiers. The monopoly rent extracted by the certifier raises the cost to kosher consumers in that market and can serve to deter local retailers from seeking kosher certification in the first place.¹¹⁹

114. *Id.*

115. *Id.* at 9.

116. *Id.*

117. *Id.*

118. *Id.*

119. Regional monopolies only exist for establishments that prepare kosher food on the premises, which requires full-time local supervision. Stories, as well as rumors, abound about retailers and vendors who fail in attempts to obtain supervision and certification in regions with a small number of consumers who exclusively eat kosher. It is difficult to determine whether these failures are simply a perfectly functioning market—that is, there is simply too little demand to support a kosher establishment—or due to anticompetitive aspects within the kosher food industry in those regions. It is not clear that there is any difference in the rate of supervision and certification of food establishments within different markets; rather in smaller communities, the failures might simply be more likely to be known. It should be noted that occasionally, Jewish business ethics law can limit options as well, since Jewish law forbids an individual from opening a competing business that is likely to destroy a competitor. AARON LEVINE, FREE ENTERPRISE AND JEWISH LAW: ASPECTS OF JEWISH BUSINESS ETHICS 4-32 (Norman Lamm ed., 1980) (discussing monopoly and restraint of trade differences and also offering an economic analysis of the Jewish position on ruinous competition).

At first glance, it would seem that consumers of kosher food would be better served by a plethora of competing KSAs that would compete not only on pricing but also on the kashrus standards used. Some consumers of kosher food might prefer to purchase food supervised by a KSA that offers greater (or less) scrutiny than another KSA would. The proliferation of KSAs might indicate that robust competition exists or at least is possible. At the same time, the continued domination of the Big Four suggests a different reality.

Consumers relying on the certification industry face two information-based shortcomings: (1) they are limited by their ability to recall and process KSA symbols and background information, and (2) the KSAs do not release the exact standards they use in the certification process.¹²⁰ The strength of certifying symbols and statements are in the notice they provide to consumers about who says the food is kosher. The reputation of the certifier is at the core of this signaling device.

The market for supervision and certification has few formal barriers to entry; nothing would prevent a group of law professors from registering a trademark (for example, the Casebook-K) and marketing this symbol to food manufacturers and retailers, seeking compensation for the use of the mark on food labels and in store windows.¹²¹ The value of certification, though, is directly related to the reliable reputation of the supervisor and certifier within the community of kosher consumers. And it is unlikely as a practical matter that this community of consumers would choose to rely on pronouncements by legal academics about the kosher quality or lack thereof of their food. Reputation is obtained not only through demonstrated truthfulness (one would think law professors might be a truthful group)¹²² but more importantly through accomplishments that demonstrate kashrus expertise, such as rabbinical ordination. It should be noted that the state, as an entity, is akin to a group of law professors—truthful at best with no relevant kashrus expertise—which might be why few have argued that the state should be involved in the supervision or certification of kosher foods.¹²³

An inherent limitation on competition is that once the volume of certifiers is too numerous for consumers to recognize who is the creator of a particular certification, the method of signaling through cer-

120. Interviews with various KSA representatives and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

121. It is important to point out that while anyone may enter the supervision and certification business, kosher fraud laws might limit how any such KSA can use the term *kosher*.

122. Compare the opinions of other law professors, students, etc.

123. *But see* the “Kosher From Florida” logo program sponsored by the Florida Department of Agriculture and Consumer Services, *available at* <http://www.fl-ag.com/kosher/kosherff.htm> (last visited Oct. 12, 2003).

tification becomes meaningless. Rather than take the time to learn each new symbol and the distinctions between a picture of two tablets with a K, a picture of a Torah with a K,¹²⁴ or a picture of a casebook with a K, some consumers have developed the short-cut of simply relying on the *old reliables* in the certification industry—namely the Big Four (OU, OK, Star-K, and KOF-K).¹²⁵

Further complicating the equation is that while competition between certifiers occurs in the kashrus standards imposed, the actual standards are not divulged to consumers or even entirely to competing KSAs.¹²⁶ At the same time, KSAs do not withhold the information either.¹²⁷ That is, they will respond to specific inquiries by other KSAs and consumers seeking information about the standards used in the supervision and certification of a particular product.¹²⁸ This odd dichotomy exists because the standards KSAs use often are client-specific and depend on confidential information about the client (automated processes, supply sourcing and scheduling, etc.).¹²⁹ Even internally, most KSAs do not create a written document defining the general standards used.¹³⁰

One KSA may grant certification to someone employing a given production process, while another KSA might find the process objectionable. Manufacturers and retailers may prefer lax kashrus standards that allow them to cut costs and do not require submission to quite as many future inspections; yet at the same time, they realize that many consumers and other KSAs prefer stricter standards. Due to vertical product integration, a manufacturer who wishes to sell his

124. Observe the KSA marks printed below (these examples are actually larger than what would appear on a food label). The first is the “Scroll K,” the mark of the Vaad Hakashrus of Denver, which predominantly certifies products and establishments in the Rocky Mountain region. The Scroll K/Vaad Hakashrus of Denver, Homepage, at <http://www.arcpac.net/Vaad/default.html> (updated Jan. 2000). The second is the “Sefer Torah-Kasher” used by the Vaad Harabbonim of Flatbush, which mostly certifies products and establishments in New York City. KosherQuest, Reliable Kosher Symbols, at http://www.kosherquest.org/html/Reliable_Kosher_Symbols.htm (last modified Mar. 5, 2001). The third is the “Tablet K,” issued by Rabbi Saffra of Lawrence, New York. KASHRUS MAGAZINE Online, 2001 Kosher Supervision Guide, at http://www.kashrusmagazine.com/ksg/nyc/nyc_metro.htm (last visited Nov. 3, 2003). While all three marks can be found on products marketed nationally, only the first two certifications are deemed reputable by mainstream Orthodox Jews. See KosherQuest, *supra*. The last is a mark for the “Kasebook” certification that does not exist.



125. Interviews with various KSA representatives and consumers (Fall 2002) (for interview clarification see *supra* note 5).

126. Interviews with various KSA representatives and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

or her product to another manufacturer who is supervised by a stricter KSA must choose supervision and certification from a KSA that the stricter one will be able to rely on.¹³¹ This vertical integration problem also allows the larger KSAs, especially the Big Four, to pressure smaller KSAs to accept their standards or lose the business altogether.¹³²

In an ideal market, a variety of standards would emerge as determined by the level of strictness desired by consumers. Consumers would be informed as to which certifiers employ what standards and could tailor their purchases accordingly. In reality, due to the vertical integration problem and the fact that consumers lack adequate information about standards, some KSAs aim to cast the broadest net possible, creating a *race to the strictest* standard of kashrus.¹³³ But other KSAs tend toward the opposite extreme: having very few standards at all. (Consumers are not likely to know the level of standards used simply by viewing a symbol declaring a food product kosher.) The world of certification can be divided on the binary metric of those KSAs accepted by the Jewish Orthodox mainstream (and acceptable to the Big Four) and those deemed not acceptable.¹³⁴ The former category certifies the vast majority of kosher food products; the latter includes the vast majority of KSAs with registered symbols.¹³⁵ To the extent KSAs release information about the standards they use, there do not appear to be many KSAs using *in between* standards of kashrus certification.¹³⁶

131. Interviews with various KSA representatives (Fall 2002) (for interview clarification see *supra* note 5).

132. *Id.*

133. *Yes, Kosher Agencies Are Tougher*, KOSHER TODAY, May 1997, available at <http://www.kosherstoday.com/kosher%20today%20archives/1997/0597/Yes,%20Kosher%20Agencies%20Are%20Tougher.htm> (last modified Nov. 16, 2000). The author stated:

Industry sources note that agencies have been toughening standards for the better part of the last decade. The Orthodox Union, OU, the nation's largest certifier is leading the pack, but the organization's leaders have repeatedly pointed out that the mass marketing of kosher and demands by consumers for tougher standards are the leading reasons for the changes.

Id.

134. Interviews with various KSA representatives and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5). One interviewee declared that around seventy percent of KSAs are not considered to be in the mainstream. *Id.*

135. *Id.*

136. *Id.* Two possible exceptions are the Triangle K and Half-Moon K. *Id.* (The reputability of these certifiers is questioned within the Orthodox community for reasons that focus on details of kashrus that are well beyond the scope of this Article). Other jurisdictions, such as Israel and some European countries (like England), feature more diverse standards of kashrus certification. *Id.* The comparatively monolithic nature of kashrus certification within the United States might be a result of how the presence of and appeal to secular law shaped the norm enforcement structure. *Id.*

(b) Who Polices the Certification Industry?

Most of the certification industry relies on self-policing methods, with KSAs monitoring the usage of their own symbols. KSAs regularly receive calls from other certifiers and consumers seeking information about the status of food products that bear that KSA's certification symbol.¹³⁷ Through this process, they can discover instances of unauthorized usage.¹³⁸ Some KSAs even encourage consumers to examine food ingredients and report *suspicious* labeling to assist them in their monitoring endeavors.¹³⁹

Some organizations then attempt to notify consumers of unauthorized trademark usages or products that are about to become de-certified. The Big Four (and some others) provide these warnings in mailings and via their websites. Interested consumers can subscribe to receive email updates of "kosher advisories and alerts."¹⁴⁰ In addition, the KSAs may request that a company undertake an advertising campaign or engage in one themselves to notify customers about an unauthorized label, when they deem it to be necessary.¹⁴¹

Jewish religious law itself imposes several requirements on supervisors and certifiers. As noted above, a certifier is prohibited from having a financial stake in the business he is certifying. This is meant to ensure that the certifier has less of an incentive to cut corners or engage in fraudulent behavior. In addition, KSAs, as competitors in the market for certification, may not engage in predatory tactics aimed at destroying a competing certifier; prohibited behavior is defined differently (and perhaps more broadly) than it would be under the United States antitrust laws.¹⁴²

137. Interviews with various KSA representatives (Fall 2002) (for interview clarification see *supra* note 5).

138. *Id.*

139. *Id.*

140. For example, to receive the OU's Kosher Alerts go to <http://www.ou.org/kosher/alerts/default.htm> and submit your e-mail address (last visited Oct. 12, 2003). Other forms of notification include the Eruv hotline, which is used to notify the local Orthodox community. Rona S. Hirsch, *Kosher Cooperation: A Local Kosher Certification Group Promises to Notify Non-Orthodox Leaders When Kosher Crises Surface*, BALT. JEWISH TIMES, May 1, 1998, at N1, available at 1998 WL 11325864. From there "local Orthodox rabbis . . . informed their congregants of the kashrut mistake." *Id.* Sometimes grocery stores display signs about a nonkosher item being sold. *Id.*

141. Interviews with various KSA representatives (Fall 2002) (for interview clarification see *supra* note 5).

142. See LEVINE, *supra* note 119, at 21-32 (explaining the Jewish approach to ruinous competition and comparing it to economic theory); *Chosen Mishpat*, in SHULHAN ARUKH ch. 156; RABBI CHAIM JACHTER, *Hasagat Gevul: Economic Competition in Jewish Law*, in GRAY MATTER 107 (2000), available at <http://www.jlaw.com/Articles/hasagatgevul.html> (last visited Oct. 12, 2003). For an example of this law in practice, see Eugene L. Meyer, *Royal Dragon Restaurant Breathing Fire; Kosher Chinese Establishment Blocks a Competitor From Opening in Maryland*, WASH. POST, April 25, 1991, at B03, available at 1991 WL 2143423 (describing one kosher restaurant's efforts to prevent a competitor from opening).

There is no group certifying the certifiers,¹⁴³ but several organizations that are not KSAs aim to help kosher consumers receive and process information about kashrus. These industry monitors work in conjunction with all KSAs and consumers in order to consolidate and distribute information about kosher certification, KSAs, alerts about unauthorized KSA symbol usages or impending decertification, and other items that might be of interest to consumers of kosher food. The two major revenue sources for the industry monitors are: (1) subscriptions by consumers (including consumer collectives like synagogues or religious schools) and industry players, and (2) advertising by manufacturers and retailers of kosher food.¹⁴⁴ This Section details some of these information monitoring and gathering organizations; all operate in a similar fashion. While these are not the only organizations fulfilling this function, they have emerged as leaders among all watchdogs.

One such agency is the Kosher Information Bureau. The Bureau began in 1976 in order to serve the community of kosher consumers in Northern California. Though its strength is still in coverage of kashrus on the West Coast, the Bureau has since expanded its scope and offers a kosher internet database, a magazine offered to consumers, and symbol cards depicting the trademarks of *acceptable* certifiers. Among its services, the Bureau maintains a Kashrus reporting agency that is nonprofit and nonaffiliated.¹⁴⁵

Another major industry monitor is *KASHRUS MAGAZINE*, a Brooklyn-based publication that has informed consumers of kosher food for over twenty years. The magazine includes consumer alerts, articles about understanding the laws of kashrus, and information about new kosher products and companies. Among its subscribers are individual consumers, KSA members, synagogues, and Jewish schools. It, too, has developed a comprehensive website to aid consumers of kosher food.¹⁴⁶ In order to increase its monitoring efforts, *KASHRUS MAGAZINE* pays a finder's fee of \$10 to anyone who brings to its attention an unknown KSA symbol or consumer alert.¹⁴⁷ This creates an incentive for consumer-monitoring efforts and pro-

143. This could be continued ad infinitum.

144. Interview with a consumer watchdog (Fall 2002) (for interview clarification see *supra* note 5).

145. KosherQuest, Home Page, at <http://www.kosherquest.com> (last modified Sept. 22, 2003).

146. *KASHRUS MAGAZINE* Online, Home Page, at <http://www.kashrusmagazine.com> (last visited Oct. 12, 2003).

147. *Be a Kashrus Watcher*, *KASHRUS MAG.*, Nov. 1993, at 6, 6.

duces dozens of responses every year.¹⁴⁸ As a result, the magazine annually reports over two hundred mislabeled products.¹⁴⁹

In addition to these organizations, several other websites attempt to gather information contained in various places on the internet. Scharf Associates operates www.kashrut.com, which touts itself as “The Premier Kosher Information Source on the Internet.”¹⁵⁰ This site, much like the other two, compiles lists of consumer alerts and product updates, and prints articles about other information of interest to the kosher consumer.

Last, Integrated Marketing Communications (IMC) is a marketing firm that specializes in community and ethnic programs.¹⁵¹ For fourteen years, IMC has sponsored Koshertoday, the International Kosher Food and Foodservice Trade Show.¹⁵² In addition, IMC publishes *Kosher Today*, a monthly trade newspaper for the kosher food industry,¹⁵³ and *Kosher Today Newsletter*, a weekly newsletter.¹⁵⁴ IMC’s main audience is not consumers; consumers comprise only 375 subscribers, representing fewer than one percent of those subscribing to IMC’s publications.¹⁵⁵

C. The Kosher Consumers

The laws of kashrus are laid out in Jewish biblical and rabbinical sources. The organizations and individuals who supervise and certify kosher food are all Jewish.¹⁵⁶ In fact, Jews run all the independent agencies that monitor the certifiers and disseminate information.¹⁵⁷

148. E-mail from Rabbi Yosef Wikler, KASHRUS MAGAZINE editor, to the author (Feb. 18, 2003) (on file with author).

149. *Id.*

150. [Kashrut.com](http://www.kashrut.com), Home Page, at <http://www.kashrut.com> (last visited Nov. 2, 2003).

151. Menachem Lubinsky, IMC Marketing & Communications: Events & Exhibitions, at <http://www.imcimpact.com/> (last visited Nov. 2, 2003). For information about IMC, see About Our Company, at <http://www.imcimpact.com/history.htm> (last visited Nov. 2, 2003). On June 5, 2003, IMC entered into a strategic alliance with Diversified Business Communications, which involves Koshertoday and Kosher Today. See Press Release, Diversified Business Communications, Diversified Business Communications and IMC Strategic Alliances Promises Growth for Koshertoday and Kosher Today (June 10, 2003), available at http://www.divbusiness.com/press_detail.asp?PRID=398 (last visited Oct. 23, 2003).

152. See Koshertoday 2003, at <http://www.koshertoday.com/> (last visited Nov. 2, 2003). IMC marketed the first Kosher Food and Jewish Life Show in 1987. About Our Company, at <http://www.imcimpact.com/history.htm> (last visited Nov. 2, 2003). The fifteenth edition of Koshertoday was scheduled for October 28-29, 2003. See Koshertoday 2003, *supra*.

153. See Kosher Today, Home Page, at <http://www.koshertoday.com/> (last visited Nov. 2, 2003).

154. Kosher Today Newsletter, at <http://www.koshertodaymagazine.com/newsletter/index.htm> (last visited Feb. 7, 2004).

155. Kosher Today, Magazine, at http://www.koshertodaymagazine.com/pdfs/Kosher_Today_mediakit.pdf (last visited Feb. 7, 2004).

156. Interviews with various KSA representatives and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

157. *Id.*

So, who are the people who consume kosher food? If you answered *Jewish people*, then you would be only partially correct.¹⁵⁸ In fact, the vast majority of kosher food is bought with no regard, and often no awareness, of the fact that it is kosher.¹⁵⁹ In 2000, retail sales of all kosher certified products was approximately \$150 billion.¹⁶⁰ Consumers intending to buy kosher products consisted of only \$4.8 billion of that total amount (roughly three percent). By 2001, this amount rose to \$5.75 billion and by 2002 it was up to \$6.65 billion.¹⁶¹

Modifying the question to *who are the people that intentionally eat food that is kosher?* does not change the answer. While most, if not all, of the people who purchase and eat kosher food exclusively are Jewish, Jews comprise a minority of people who choose to consume kosher food. The majority of the kosher food consumers can be broken down into several different categories: (1) those who observe dietary restrictions imposed by another religion, (2) those who suffer from food allergies, aversions, or intolerances, and (3) those who wish to keep vegetarian, vegan, other morally-based or health-conscious diets, or who believe that kosher food is a higher quality product.¹⁶²

In some ways, the community of kosher consumers is dynamic. When the first kosher fraud statute was enacted in 1915,¹⁶³ observant Jews accounted for nearly all consumers of kosher food.¹⁶⁴ Over time, however, the consumer group grew more diverse due to changes in immigration patterns in the United States, growing consumer interest in *ethnic* or specialized foods, and the general proliferation and success of the kosher supervision and certification process.¹⁶⁵

158. See *Ran-Dav's County Kosher, Inc. v. State*, 608 A.2d 1353, 1372 (N.J. 1992) (Stein, J., dissenting) (“[F]ewer than one-third of the consumers of kosher products are Jewish”); Kathy Stephenson, *Keeping Kosher*, SALT LAKE TRIB., June 19, 2002, at C1 (reporting that twenty percent of consumers who buy kosher are Jewish); Elliot Zwiebach, *Focusing on the Future*, SUPERMARKET NEWS, Oct. 14, 2002, at 16 (noting in a profile of Albertson's Company that thirty percent of consumers who buy kosher are Jewish).

159. *But see* Steve Levin, *New Products Abound at Kosherfest*, PITTSBURGH POST-GAZETTE, Dec. 11, 1997, at G5 (“Studies and scanner surveys have shown that when shoppers are faced with a choice between kosher and nonkosher products, they'll choose kosher, whether it's a subconscious or conscious choice.”).

160. Kosher Today, *The Kosher Food Market in the U.S.A.: U.S. Sales of Food That Are Certified Kosher*, at <http://www.koshertoday.com/resourcecenter/charts/retailsales.htm> (last visited Nov. 2, 2003).

161. *The Kosher Food Market in the U.S.A.: Dollars Spent by Consumers Who Look for Kosher Food Products* [hereinafter *Dollars Spent*], at <http://www.koshertoday.com/resourcecenter/charts/dollarsspentconsumr.htm> (last visited Nov. 2, 2003).

162. See *Ran-Dav's*, 608 A.2d at 1356; Stephenson, *supra* note 158, at C1.

163. The Kosher Food Distributors Organization, *The History of Kosher Food in the U.S.A.*, at <http://www.koshertoday.com/history.htm> (last visited Nov. 2, 2003) (on file with author).

164. Berman, *supra* note 11, at 15, 45.

165. See Fishkoff, *supra* note 89, at O7 (“In 1991, both *Food and Wine* and *Rolling Stone* magazines declared kosher the hottest new food trend of the decade.”).

Market estimates report that Jews account for some thirty percent of kosher food consumers. At the same time, some Jewish consumers, who are a minority among all kosher consumers, almost exclusively buy kosher and are particularly dependent on the kosher food industry.¹⁶⁶ The other groups comprising the remaining seventy percent of kosher consumers do not exclusively purchase kosher food. Thus, they are not as readily identifiable, and the groups are somewhat transient. More importantly, they represent less market participation than their numbers suggest. In 2002, of the \$6.65 billion spent by kosher product consumers, Jewish consumers spent \$3 billion, or forty-five percent.¹⁶⁷ That is, while Jews represent fewer consumers (since many of them only buy kosher food), they are buying disproportionately more kosher food than their numbers suggest.

The reason consumers buy kosher food matters. It affects the customer's level of sophistication and knowledge about kashrus, the risk the consumer is willing to take with regard to mistake or fraud, the harm to the individual if nonkosher food is consumed, and the extent to which the consumer must depend on the kosher food industry as a whole. It also affects the likelihood that the individual will learn, either before or after the fact, that nonkosher food can be mistakenly or fraudulently sold under the guise that it is kosher. This Section discusses the differences between the various individuals that form the pool of kosher consumers.

1. *Observant Jews*

As noted above, nearly one-third of the people who intentionally buy kosher food are Jewish. A fraction of these people work within the kosher food industry, as retailers, members of KSAs, or monitoring agencies.

There is a great deal of variance within the Jewish population with regard to knowledge of the laws of kashrus. Even those who actively keep a kosher kitchen at home may not be experts on kashrus. The bulk of consumers who exclusively purchase and eat kosher food are the most sophisticated consumers within the entire industry.¹⁶⁸ While many might not understand the intricacies of kashrus, these kosher consumers know more of the basic rules, recognize more of the KSA symbols, and are more actively involved in seeking out in-

166. Interview with consumers and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

167. *Dollars Spent*, *supra* note 161; Kosher Today, *The Kosher Food Market in the U.S.A.: Scope and Size of 2002 Market Who Are Looking for Kosher Products*, at <http://www.koshertoday.com/resourcecenter/charts/scopeandsize.htm> (last visited Nov. 2, 2003) [hereinafter *Scope and Size*].

168. Interviews with various KSA representatives, consumers, and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

dustry information than any other group.¹⁶⁹ They comprise the majority of subscribers to those publications monitoring and gathering information and are the intended audience for the typical “kosher advisories and alert.”¹⁷⁰

Not all Jewish consumers of kosher food are Orthodox, but most are. Not only do intra-Orthodox debates exist, there also are differences between the standards of kashrus required by Orthodox and Conservative Judaism. Some may consider these differences negligible; yet these nuances are very important to the observant individual. And it is these types of differences that led to the current constitutional assault on kosher fraud statutes.

Kashrus standards vary by individual, as well as the amount of risk a consumer is willing to assume. Even with the supervising and certifying industry, no one can be one hundred percent certain that food is kosher, but this does not seem to deter most consumers. Though they would not identify it as such, most Jewish consumers appear to have adopted a negligence standard of observance: it is forbidden to eat food that one knows to be or should know to be not kosher.¹⁷¹

Though the laws of kashrus do not explicitly require this level of observance, they do provide an analogous rule concerning mistake and nullification. As noted above, one may not mix meat and dairy products. However, if some milk is mistakenly added to a pot cooking meat, then that amount is nullified if it is less than one-sixtieth of the overall contents.¹⁷² This exception applies in cases of genuine mistake, rather than intentional, reckless or negligent conduct.¹⁷³ The laws of kashrus allow for certain other leniencies in the aftermath of an honest mistake that is not the result of negligence, recklessness, or intentional behavior.¹⁷⁴

169. *Id.*

170. *Id.*

171. *Id.*

172. SHULHAN ARUKH, *supra* note 24, at ch. 106. The principle behind this nullification is to prevent large quantities of food from being wasted by virtue of an accident. Interview with KSA representative (Fall 2002) (for interview clarification see *supra* note 5).

173. SHULHAN ARUKH, *supra* note 24, at ch. 106. If the mixing is intentional, no amount can nullify the impermissible combination. Interview with KSA representative (Fall 2002) (for interview clarification see *supra* note 5).

174. For example, imagine that three consumers each buy and eat one hot dog, honestly believing that the food is kosher. If it is later discovered that one of the three hot dogs was in fact not kosher, but no one can identify which hot dog it was, each consumer is permitted to assume that she was in the majority and purchased one of the two kosher hot dogs, even though it is a forgone conclusion that this assumption will be wrong as applied to one of the three. However, if a consumer learns that there is a one in three chance that the food he or she purchased or will purchase is not kosher, he or she may not simply assume to be in the kosher majority. Interviews with various KSA representatives (Fall 2002) (for interview clarification see *supra* note 5).

It is difficult to quantify the amount of harm done to the religiously motivated consumer who buys nonkosher food either by mistake or through fraud. In some cases, the consumer may have paid a premium for the food to be kosher, so at a minimum, the damage would be the extra amount paid for a good not received.¹⁷⁵

Beyond this, if a consumer brings nonkosher food into her home, it can set off a chain of transference and absorption problems that literally can *contaminate* an entire kitchen.¹⁷⁶ For the lucky consumer, it is merely time consuming to restore the affected pots, pans, appliances, and utensils to their *kosher status*.¹⁷⁷ The less fortunate may find that these items need to be replaced entirely.¹⁷⁸

Given the chain reaction that discovery triggers, it may appear that the kosher consumer is better off not knowing that she has purchased nonkosher food. After all, provided she has not been negligent, how could she possibly be held responsible for the fact that she has consumed, and continues to consume, nonkosher food? Nonetheless, many observant Jews believe there is a spiritual harm that occurs when they eat nonkosher food, even if it was by accident and undiscoverable.¹⁷⁹ An unknowing violation that affects an entire kitchen perpetuates this non-quantifiable harm indefinitely.

2. Other Religious Minorities

Judaism is not the only religion that imposes dietary restrictions upon its adherents. Observant Muslims, Seventh-Day Adventist (SDA) church members, and Hindus, to name only a few religious groups, are required to adhere to dietary limitations as well.

SDA members abstain from “soul-defiling habits,” which are interpreted to include some of the Old Testament dietary laws as well as other principles of healthful eating.¹⁸⁰

175. Cf. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 331(c) (2002) (prohibiting sale of adulterated or misbranded products).

176. See *supra* Section II.A.2.(b).

177. Actually, the luckiest consumer is the one permitted to rely on a leniency, such as the one described *supra* note 174.

178. This depends on the way the consumer used the food and the component material of the utensils. Interviews with various KSA representatives, consumers, and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5). There are some after-the-fact leniencies permitted within kashrus. *Id.* Thus, any party who encounters fraud or mistake should not rely on any kashrus primer (which presents rules that must be followed as a primary matter), but rather should consult with a trusted rabbi to see what corrective action must be taken. *Id.*

179. See LIPSCHUTZ, *supra* note 18, at 10 (“The Sages (Yoma 39b) teach that the eating of nonkosher food has a harmful effect on the Jewish soul, even if it was done unintentionally.”).

180. See Seventh-Day Adventist Church, *Fundamental Beliefs: Christian Behavior*, (“[W]e are to adopt the most healthful diet possible and abstain from the unclean foods identified in the Scriptures. Since alcoholic beverages, tobacco, and the irresponsible use of

Islam requires that food be halal or permissible.¹⁸¹ There is some overlap between halal and kosher food.¹⁸² Similarly, Muslims may not eat pork or pork products, carnivorous animals, blood, insects, reptiles, and animal-based gelatin, fats, or rennet.¹⁸³ Also, animals must be ritually slaughtered (*zabiha*) for meat to be halal; some Muslims accept kosher slaughter while others do not.¹⁸⁴

While kosher is a useful proxy, the realm of kosher food is both under and over inclusive for Muslims who wish to eat halal.¹⁸⁵ For example, halal food may not contain alcohol;¹⁸⁶ kosher food may. On the other hand, a meal is still halal where milk and meat are mixed together,¹⁸⁷ whereas *kashrus* forbids this combination.

drugs and narcotics are harmful to our bodies, we are to abstain from them as well Eph. 5:1-21; Phil. 4:8; 2 Cor. 10:5; 6:14-7:1 . . . 1 Cor. 6:19, 20; 10:31; Lev. 11:1-47 . . .”), at <http://www.adventist.org/beliefs/index.html> (last visited Nov. 3, 2003).

181. The Qur'an states:

He hath only forbidden you dead meat, and blood, and the flesh of swine, and that on which any other name hath been invoked besides that of Allah. But if one is forced by necessity, without willful disobedience, nor transgressing due limits—then is he guiltless. For Allah is Oft-forgiving Most Merciful.

THE MEANING OF THE HOLY QUR'AN 2:173 (Abdullah Yusuf Ali trans., 10th ed. 1999).

182. For a discussion of the use of kosher proxy, see generally Stanley Sacharow, *Islamic Marketing Opportunities Opening Up for Converters*, 69 PAPER, FILM & FOIL CONVERTER 58 (1995).

183. Muslims believe in the original version of the Old Testament. “Moslems seem to go straight for the Kosher section with the peace of mind that they will not consume pork products.” *Supermarkets Stock Kosher Meats—Independent Butchers Cry Foul*, KOSHER TODAY, Jan. 1998, available at <http://www.koshertoday.com/kosher%20today%20archives/1998/0198/Supermarkets%20Stock%20Kosher%20Meats-Independent%20Butchers%20Cry%20Foul.htm> (last modified Nov. 16, 2000).

184. For meat to be considered correctly *zabiha* or *zibya*, and therefore halal, the animal's blood must be drained wholly and a prayer recitation at the time of slaughtering must be performed: “Bismillah, Allah Akbar,” which translates to “In the name of Allah, Allah is the Greatest.” “So eat of (meats) on which Allah's name hath been pronounced, if ye have faith in His signs.” THE MEANING OF THE HOLY QUR'AN, *supra* note 181, at 6:118. Kosher slaughter requires a blessing, but not before each act. Some Muslims will rely on kosher slaughter; others won't. Save pork, Muslims are allowed to eat the food of the “people of the book” (Jews and Christians). *Id.* at 5:5. Furthermore, it is tradition for a Muslim guest not to ask his Muslim host if the meat that is being presented is *zibya*. If the meat is not, the “sin” is shifted to the Muslim serving the food, according to Muslim tradition (saying of one of the companions of the prophet).

185. Kosher proxy usage is most common among Muslims in regions where the development of kosher supervision and certification far exceeds available halal certification. Interviews with various KSA representatives, consumers, and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5). For example, some of Israel's Muslim population relies on kosher certification. *Id.*

186. See THE MEANING OF THE HOLY QUR'AN, *supra* note 181, at 2:219 (“They ask thee [Muhammed] concerning wine and gambling. Say: ‘In them is great sin, and some, profit, for men; but the sin is greater than the profit.’”); *id.* at 4:43 (admonishing against praying while drunk). *But see id.* at 16:67 (“From the fruits of date-palms and grapes there derives a strong drink . . . a goodly provision.”). Alcohol can be used by Muslims for medical purposes.

187. *Cf. id.* at 16:66 (describing how milk comes from a cow).

There is halal certification of food, and it operates similarly to kosher certification. The Islamic Food and Nutrition Council of America (IFANCA) is one such halal certifying agency (HCA) that operates in the United States, and its system of investigation and supervision parallels that of the OU and other KSAs.¹⁸⁸ While halal certification is fairly established in many international markets, it lags far behind kosher supervision and certification within the United States.

The progress that Muslims seemed to have made towards establishing their own supervision and certification system in lieu of reliance on the kosher proxy may have been slowed in the aftermath of September 11th. To create a system of supervision and certification, potential certifiers must be able to convince potential clients in the food industry that it would be profitable to have certification. Given the political climate within the United States, manufacturers and retailers may fear this initiative because: (1) by obtaining halal certification of their products, they may lose sales from other consumers who would view the certification as a signal that the producer harbors *unwarranted* sympathy toward Muslims, or (2) Muslims cannot be trusted to keep trade secrets learned through the supervision process confidential. It is not clear how likely it is that these concerns exist and affect behavior. As long as hostility toward religious Muslims continues within the United States, the kosher proxy remains a viable, if partial, option.¹⁸⁹

The risk and harm stemming from consuming haram (and its proxy nonkosher) is similar to the harm within Judaism. Muslims must avoid questionable, or mashbooh (MAHS-booh), foods, which serves as a negligence standard of observance.¹⁹⁰ The spiritual and contamination harms are analogous, though not identical.

Likewise, Hindus are not supposed to eat certain animal products—primarily, beef and beef-derivatives.¹⁹¹ A Hindu clearly could

188. See Joe M. Regenstein & Carrie E. Regenstein, *Looking In*, KASHRUS MAG., Sept. 1990, at 46, 46 (reporting that IFANCA is considering a “circle M” and or a “crescent M”).

189. See Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 794 (1998) (“The day may come when a legislature’s failure to protect followers of Islam in adhering to their dietary restrictions amounts to unacceptable discrimination.”).

190. See SAHIH AL-BUKHARI, COMMENTARY ON HOLY QUR’AN 2:172, at 39 (“Both legal and illegal things are evident but in between them there are doubtful (unclear) things, and most of the people have no knowledge of them. So whoever saves himself from these unclear things, he saves his region and his honor.”). See generally Javid Aziz Awan, *Islamic Food Laws-I: Philosophy of the Prohibition of Unlawful Foods*, in 3 SCIENCE & TECHNOLOGY IN THE ISLAMIC WORLD 151-65 (1998); Saud Twaigery & Diana Spillman, *An Introduction to Moslem Dietary Laws*, FOOD TECHNOLOGY, Feb. 1989, at 88-90.

191. The Hindu document Caraka-Samhita identifies beef as unwholesome, and therefore to be avoided by the majority of people. Louis E. Grivetti, *Taboo-Hindu Dietary Codes*, at <http://teaching.ucdavis.edu/nut20/0050.htm> (Feb. 23, 2002) (on file with author).

not eat kosher meat, but could rely on the kosher-pareve label to indicate food that is free from all animal-sourced material. Recently, McDonald's settled several class-action lawsuits that had been initiated by a Hindu plaintiff contesting McDonald's use of beef extract to flavor its french fries after publicizing that the fries were cooked in one hundred percent vegetable oil.¹⁹² The settlement demonstrated the overlap between kosher and other proxy users, like Hindus and vegetarians, as McDonald's agreed to pay \$10 million, the majority of which is to be distributed amongst Hindu, vegetarian, and kosher organizations.¹⁹³

3. *People with Food Allergies, Sensitivities and Intolerances*

The number of people who suffer from food allergies, sensitivities, or intolerances is at an all-time high. Clinically proven food allergies occur in up to eight percent of children under three years of age and one to two percent of adults.¹⁹⁴ Common food sources for severe complications include dairy, eggs, nuts, and shellfish.¹⁹⁵ At least one in ten Americans has a lactase deficiency, which renders him or her lactose intolerant.¹⁹⁶ Current federal guidelines do not regulate use of the term *dairy-free*, and while the FDA does define the term *non-dairy*, the definition permits foods with the nondairy label to contain milk proteins, such as casein.¹⁹⁷ Individuals who react severely to milk products can suffer anaphylactic shock from even traces of dairy by-products, milk proteins, and derivatives (such as caseinate or whey), or the use of equipment that has been "contaminated" with other dairy products.¹⁹⁸ One type of product notorious for presenting this problem is nondairy creamers.¹⁹⁹

Kosher certification can help these consumers observe diets that respect their allergies, sensitivities, and intolerances. The *pareve*, *dairy*, and *dairy equipment* labels inform some of these consumers

192. Richard Gibson, *McDonald's to Donate \$10M in Hindu French Fry Case*, DOW JONES NEWS SERV., June 4, 2002.

193. *Id.*

194. Hugh A. Sampson, *Food Allergy. Part I: Immunopathogenesis and Clinical Disorders*, 103 J. ALLERGY & CLINICAL IMMUNOLOGY 717, 717 (1999).

195. *Id.* at 720.

196. See NAT'L DIGESTIVE DISEASES INFO. CLEARINGHOUSE, NAT'L INSTS. OF HEALTH, LACTOSE INTOLERANCE (NIH Publication No. 03-2751) (Mar. 2003) (stating that "[b]etween 30 and 50 million Americans are lactose intolerant"), at <http://digestive.niddk.nih.gov/ddiseases/pubs/lactoseintolerance/> (last visited Jan. 7, 2004).

197. Steve L. Taylor & Martin J. Hahn, *Dairy-Free and Non-Dairy: What Do These Terms Mean for Milk-Allergic Consumers?*, The Food Allergy Resource and Research Program, General Allergen Information Library, at <http://www.farrp.org/articles/dairyfree.htm> (last visited Oct. 17, 2003).

198. See James E. Gern et al., Brief Report, *Allergic Reactions to Milk-Contaminated "Nondairy" Products*, 324 NEW ENG. J. MED. 976, 976, 978 (1991).

199. EIDLITZ, *supra* note 14, at 150.

what they need to know about a given product. At the same time, the kosher-pareve proxy is imperfect. There has been a handful of reported cases of milk-allergic children reacting to food labeled as kosher-pareve.²⁰⁰ As a result, the Food Allergy & Anaphylaxis Network does not recommend that individuals with milk allergies rely on kosher-pareve labeling.²⁰¹

KSAs also are growing increasingly aware that these consumers are relying on their information. Recently, some manufacturers and their KSAs have used labels to notify consumers of particular products that are otherwise pareve, but might be affected by the presence of airborne dairy dust particles that are too insignificant to render the product *dairy* under the laws of kashrus.²⁰²

While the degree of harm and risk taken by consumers varies with the severity of their food allergy (consumers' sensitivity and intolerance), members of this group may suffer the greatest physical damages if they consume food touted to be kosher-pareve that, in fact, is not.²⁰³

4. *People with Vegetarian, Vegan, Other Morally-Based, or Health-Conscientious Related Diets*

Some kosher consumers wish to observe dietary restrictions that in some ways overlap with kashrus. The dairy, meat, and pareve labels help diligent vegetarians and vegans avoid the difficult task of inspecting ingredients and accidentally consuming animal-sourced

200. See S.O. Forman et al., Abstract, *Cow's Milk Related Anaphylaxis in a Known Milk Allergic Patient*, 95 J. ALLERGY & CLINICAL IMMUNOLOGY 331, No. 763 (1995) (discussing the case of a four-year-old child who had an allergic episode from eating a pareve cookie from a local kosher bakery because the cookie improperly contained whey protein instead of soy protein); Gern et al., *supra* note 198, at 978 (describing three cases of milk-allergic patients who had adverse reactions to pareve frozen dessert products); S.L. Hefle et al., Abstract, *Anaphylactic Reactions to "Pareve"-Labeled Dark Chocolate in Milk-Allergic Children*, 103 J. ALLERGY & CLINICAL IMMUNOLOGY S237, No. 911 (1999) (describing three cases of pareve dark-chocolate that contained milk residue); Richard T. Jones et al., *Anaphylaxis in a Milk-Allergic Child After Ingestion of Milk-Contaminated Kosher-Pareve-Labeled "Dairy-Free" Dessert*, 68 ANNALS ALLERGY 223, 223-27 (1992) (describing the reaction of a two-year-old to pareve sorbet which contained milk residue); S. Mofidi et al., Abstract, *Reactions to Food Products Labeled Dairy-Free: Quantity of Milk Contaminant*, 105 J. ALLERGY & CLINICAL IMMUNOLOGY S138, No. 417 (2000).

201. Food Allergy & Anaphylaxis Network, *Common Food Allergens*, at <http://www.foodallergy.org/allergens.html> (last modified Sept. 21, 2003).

202. Interviews with KSA representatives and food scientists (Fall 2002) (for interview clarification see *supra* note 5). Some companies, including Barton's chocolate (some of the products are certified OU pareve) and Ferrara Pan candy (some of which are certified kosher-pareve by the St. Paul-based United Mehadrin Kosher), include warnings on their labels that pareve food may contain traces of milk that would affect allergic individuals but are insignificant as a matter of Jewish law. Interviews with various KSA representatives (Fall 2002) (for interview clarification see *supra* note 5).

203. See Antony Ham Pong, *Milk Allergy*, at <http://www.calgaryallergy.ca/Articles/milkallergyhp.htm> (last visited Nov. 2, 2003).

food. A vegetarian activist who relied on the kosher pareve label to avoid animal products was one of the intervenors in the constitutional challenge to the New York kosher fraud statute.²⁰⁴

The consumers in this group vary greatly in their level of knowledge, diligence, and devotion to the restrictive diet. Some of those who base their diets on moral principles may view consuming prohibited foods as spiritually harmful, much like those who are motivated by the dictates of a particular religion.

Assuming spiritual reasons are not prevalent, those who follow dietary guidelines or consume higher quality foods in order to be more healthy and face a one-time instance of mistake or fraud suffer little beyond any premium paid for the desired food product. One consumer claimed to have kept kosher for over twenty years because, “[i]t’s fresh, it tastes good and hits the spot.”²⁰⁵

One big difference between this group and the group of religiously-motivated consumers is that they do not seem to have adopted analogous rules of utensil transference and absorption. Mislabeled or fraudulently sold food will not *contaminate* others; a vegetarian who is sold a *kosher* veggie burger that includes traces of nonkosher meat suffers a one-time harm, not an ongoing one.


III. EXISTING SANCTIONS & ENFORCEMENT SCHEMES

Consumers face the threat that nonkosher or otherwise incorrectly identified kosher food will be sold under the guise that it is certified. Part of this threat comes from the possibility that products have been mislabeled or misidentified by accident or inadvertence. Manufacturers, retailers, certifiers, and independents may attempt to distribute recalls and notice when this occurs.²⁰⁶

One threat to consumers, though, has more nefarious roots. Manufacturers and retailers have a financial incentive to commit *kosher fraud*, or in other words, to sell food that they claim to be kosher, even though they either know or should know that it is not. Obtaining kosher certification bears costs. Though this cost is normally offset by the increased demand, a fraudulent party who

204. Memorandum of Law in Support of Motion to Intervene as Defendants, *Commack Self-Serv. Kosher Meats, Inc. v. Rubin*, 106 F. Supp. 2d 445 (E.D.N.Y. 2000) (No. 96-0179) (proposed intervenor is “a vegetarian activist who relies on kosher labelling [sic] to indicate that food contains no animal products”), available at <http://www.jlaw.com/Briefs/motion.html> (last visited Nov. 1, 2003).

205. Laski, *supra* note 19 (quoting Art Moreno, a North Hollywood landscaper who is not Jewish).

206. See, e.g., Andrew Herrmann, *Jews in ‘Panic’ over Counterfeit Kosher*, CHI. SUN-TIMES, Nov. 22, 1987, at 3 (noting the recall of about 350,000 pounds of meat); *The Illegal* , at <http://www.ou.org/publications/ja/5763/5763winter/kosherko.pdf> (last visited Nov. 6, 2003).

proclaims to be selling kosher food can reap the rewards of this extra demand, without incurring the certification costs. Even if the market is competitive, the fraudulent actor has lowered his costs and can undercut market price.

The kosher meat market is particularly attractive for fraud. While the cost and price of most kosher food products are not significantly different than that of their nonkosher counter-parts, the cost and price of kosher meat and poultry is significantly higher on average.²⁰⁷ The processes of draining the blood, soaking and salting the meat, and the inability to detect animals with internal blemishes (which renders them nonkosher) in advance of slaughtering, all add to the cost of the product.²⁰⁸ These costs are passed along to the kosher consumers, who willingly pay a premium for the benefit of purchasing kosher meat. A fraudulent meat processor or butcher can pocket this *kosher premium* without incurring the costs that *kashrus* necessarily imposes.

For many years, kosher consumers have been concerned about fraud within the kosher food industry. Kosher fraud in America is nearly as old as the nation itself. During the 18th century, the Shearith Israel Congregation employed the only slaughterer of kosher meat in New York.²⁰⁹ The Congregation profited from shipping its kosher meat, accompanied by certificates and labeled with the Congregation's seal, throughout the Americas.²¹⁰ In 1796 and 1805, two unscrupulous meat vendors were found to have affixed the Congregation's seal on meat that was not kosher.²¹¹

For the past eighty years, consumers have been protected by a multitiered enforcement scheme that aims to deter fraud. The three tiers in this system are nonlegal activity (private ordering), private law (for example, consumers may pursue common law remedies in contract or tort, KSAs bring suits in trademark infringement), and public law (for example, civil and criminal statutes authorize state and local officials to actively investigate or prosecute fraudulent ac-

207. In the Shelat example, discussed *infra* Section IV.B.1.(c)i., the Illinois attorney general's office followed up a claim of nonritually slaughtered chicken being sold as kosher. Herrmann, *supra* note 206, at 3. The company allegedly "[bought] the processed fowl for about 40 cents a pound . . . then sold it as kosher for about \$2.25 a pound." *Id.*; see also Rosenthal, *supra* note 11, at 954 (stating that "[m]erchants can sell kosher products for up to three times the price of a similar nonkosher one.").

208. Rosenthal, *supra* note 11, at 954 (noting that kosher fraud has historically been a problem in the United States).

209. JEREMIAH J. BERMAN, SHEHITAH: A STUDY IN THE CULTURAL AND SOCIAL LIFE OF THE JEWISH PEOPLE 275 (1941). The estimated Jewish population was 1000-3000 during the Revolutionary Era. AM. JEWISH HIST. SOC'Y, AMERICAN JEWISH DESK REFERENCE 35 (1999) [hereinafter AM. JEWISH HIST. SOC'Y].

210. BERMAN, *supra* note 209, at 280.

211. *Id.* at 284-85.

tors). This Section lays out the three tiers of enforcement that operate to deter fraud in the kosher food industry.

A. Tier One Enforcement: Reputation-Based Nonlegal Sanctions

The power of reputation mechanisms has been documented both within the Orthodox Jewish community²¹² as well as in other contexts.²¹³ Within the kosher food industry, it is imperative that a food manufacturer or retailer maintains a reputation as someone who sells food that is unquestionably kosher. The same characteristics that create the demand for the certification industry—the lack of access to the process, the difficulty in understanding the laws of kashrus, etc.—create a market that is essentially dependent on the good name or reputation of the manufacturer, vendor, and certifier.

As more than one industry monitor and participant have explained, perpetrators of fraud (as opposed to mistake) do not get a second chance.²¹⁴ Once they are caught, they will lose their business as a manufacturer or retailer of kosher food permanently.²¹⁵ To give an example, restaurant XYZ was certified by one of the Big Four.²¹⁶ The owners of XYZ tried to hide the fact that it was intentionally buying nonkosher food in order to prepare it and serve it to consumers.²¹⁷ The KSA inspector discovered the fraud, and the KSA immediately decertified the restaurant.²¹⁸ Since the restaurant's reputation was destroyed, no KSA wanted to risk its own reputation by agreeing to certify the known fraud perpetrator.²¹⁹ Information about the fraud spread

212. See Bernstein, *supra* note 3; Richman, *supra* note 3.

213. See, e.g., Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841, 874-84 (1999) (discussing reputation of lenders within immigrant communities); Jason Scott Johnston & Joel Waldfogel, *Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Litigation*, 31 J. LEGAL STUD. 39, 59-60 (2002) (comparing effects of repeat-play attorneys, who have strong reputation-based incentives for cooperation, with desires of one-shot clients); Toshihiro Matsumura & Marc Ryser, *Revelation of Private Information About Unpaid Notes in the Trade Credit Bill System in Japan*, 24 J. LEGAL STUD. 165, 166-68 (1995) (describing other studies demonstrating reputation mechanisms and focusing on the information collection mechanisms used by creditors in Japan to harm the reputation of parties who default); John McMillan & Christopher Woodruff, *Private Order Under Dysfunctional Public Order*, 98 MICH. L. REV. 2421, 2451 (2000) (exploring commercial transactions in Eastern Europe and Vietnam and concluding that courts and reputation do substitute one for the other).

214. While this is only one story, there are others like it, where once the fraud is discovered, usually by the supervising KSA, the effects on reputation destroy the business. Interviews with various KSA representatives and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

rapidly among kosher consumers.²²⁰ Thereafter, the business immediately failed.²²¹

B. Tier Two Enforcement: Private Law Remedies

1. Consumer Remedies

Consumers who discover that they are victims of kosher fraud can sue the violating party under theories of contract or tort. For example, a consumer can sue the perpetrator for breach of contract for kosher food on the grounds that the kosher nature of the food was a material component of the deal.²²² A consumer could also sue in tort for misrepresentation of a material fact.²²³ The consumer could seek a damage award that would cover the amount of harm she suffered.²²⁴

Traditional damages may serve some kosher consumers better than others. Those consumers who suffer from food allergies, insensitivities, and intolerances are likely to fair the best if they can bring a successful claim for breach of contract, breach of duty, or misrepresentation.²²⁵

220. *Id.*

221. *Id.*

222. See RESTATEMENT (SECOND) OF CONTRACTS §§ 159-173 (1979) (on misrepresentation generally). Section 162 reads:

(1) A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker (a) knows or believes that the assertion is not in accord with the facts, or (b) does not have the confidence that he states or implies in the truth of the assertion, or (c) knows that he does not have the basis that he states or implies for the assertion. (2) A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so.

RESTATEMENT (SECOND) OF CONTRACTS: WHEN A MISREPRESENTATION IS FRAUDULENT OR MATERIAL § 162 (1979).

223. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 9 (1997) (“One engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a fraudulent, negligent, or innocent misrepresentation of material fact concerning the product is subject to liability for harm to persons or property caused by the misrepresentation.”).

224. See RESTATEMENT (SECOND) OF CONTRACTS: MEASURE OF DAMAGES IN GENERAL § 347 (1979); RESTATEMENT (SECOND) OF TORTS §§ 549, 552B, 552C cmt. f (1977). The damages for fraudulent, negligent, or even mistaken misrepresentation within the context of a sale include restitution damages, “the difference between the value of what [the plaintiff] parted with and the value of what he has received and still retains[,]” for reliance on misrepresentation. RESTATEMENT (SECOND) OF TORTS: MISREPRESENTATION IN SALE, RENTAL OR EXCHANGE TRANSACTION § 552C cmt. f (1977).

225. *Cf.* *Merrill v. Beaute Vues Corp.* 235 F.2d 893, 899-900 (10th Cir. 1956) (Murray, J., concurring) (discussing competing theories on whether proof that a small segment of the population may be allergic to a product imposes duty to warn); *Kennedy v. Baxter Healthcare Corp.*, 50 Cal. Rptr. 2d 736, 745 (Ct. App. 1996) (refusing to certify class of latex-allergic plaintiffs given individual differences among proposed members); *Briggs v. Nat'l Indus.*, 207 P.2d 110, 112 (Cal. Ct. App. 1949) (holding injuries from allergic reactions to ordinary products not compensable); *Bennett v. Pilot Prods. Co.*, 235 P.2d 525, 527 (Utah 1951) (holding injuries from allergic reactions to ordinary products not compensable as a matter of law).

Damage awards can reimburse medical costs and compensate for pain and suffering as well as emotional distress that accompanies the obvious physical harm.²²⁶

There is little guidance of what award would be appropriate for other types of kosher consumers.²²⁷ Courts typically do not compensate adequately, or sometimes at all, for emotional distress or spiritual harms that occur independent of physical damage.²²⁸ In addition, it is unclear if consumers can be compensated for the costs associated with fixing or replacing utensils that have been contaminated by transference or absorption. Although these costs can be seen as foreseeable consequential damages caused by the sale of nonkosher food to kosher consumers, they are not damages that courts regularly award.²²⁹ Some judges would simply order that the customer is entitled to get her money back to be made whole again.²³⁰ Even if courts properly compensated the individual consumer, the cost of the suit itself could often outweigh any damages available. However, kosher consumers could request punitive damages in the case of a repeat or particularly devious

226. See *Cooper v. Borden, Inc.*, 709 So. 2d 878, 883 (La. Ct. App. 1998) (upholding trial court award of \$1500 to penicillin-allergic plaintiff who purchased milk that improperly contained penicillin).

227. See Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 683 n.74 (1985) (suggesting that the correct damage measure for resulting consumer injuries is the amount the consumer would have been willing to pay ahead of time knowing that non-kosher food might be substituted and further suggesting that the answer often is that no amount would be enough).

228. RESTATEMENT (SECOND) OF CONTRACTS: LOSS DUE TO EMOTIONAL DISTURBANCE § 353 (1979) ("Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result."). For a discussion suggesting that serious injury is likely to occur, see Jan Crawford, *2 Firms Fined \$250,000 for False Kosher Labels*, CHI. TRIB., Nov. 25, 1987, at 2 (quoting an attorney for the OU who noted that kosher fraud "tamper[s] not only with the religions, but the emotional and moral convictions of a segment of the population").

229. For example, most of the cases that involve the awarding of damages for religious or spiritual harms occur in the context of the government violating some free exercise right. See *Abdul Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1214-15 (10th Cir. 1999) (declaring that Muslim prisoner who was unable to exercise his religion during Ramadan can collect more than nominal damages, but vacating the award of \$9,000 as too abstract); *Nolley v. County of Erie*, 802 F. Supp. 898, 905 (W.D.N.Y. 1992) (awarding \$10 in presumed damages per session to an inmate who was improperly confined in segregation and denied access to religious services for thirty-five weeks). Compare one remarkable case where several plaintiffs sued a televangelist and his church alleging fraud, conspiracy, and intentional infliction of emotional distress. In *Tilton v. Marshall*, 925 S.W.2d 672, 680 (Tex. 1996), despite recognizing the validity of the plaintiffs' claim, the Texas Supreme Court refused to award damages for allegedly unanswered prayers. The court noted that "[b]ecause it is beyond judicial inquiry whether plaintiffs' prayers would have been answered had Tilton fulfilled his promises to read, touch, and pray over their tithes and prayer requests, plaintiffs' damages, if any, may not include compensation for their allegedly unanswered prayers." *Id.* at 675.

230. See *Tilton*, 925 S.W.2d at 680 (noting that in a fraud case, the usual measure of damages is the actual amount of plaintiff's loss).

offender. There is also the possibility of kosher consumers joining forces to bring a class action against a party who has defrauded many.

2. KSA Remedies

A KSA who finds that a fraud perpetrator is engaging in an unauthorized usage of its symbol can bring a cause of action against that party under trademark law.²³¹ Treble damages and attorneys' fees are available for willful infringement or the counterfeit of marks.²³² The organization would be able to obtain an injunction to prevent future unauthorized usages as well as damages to compensate for any harm from the infringement.²³³ Some courts would allow the KSA to employ theories of restitution that would enable it to collect an amount based upon the profits of the infringing party.²³⁴

C. Tier Three Enforcement: Consumer Protection Laws

1. Laws of General Application

Most states have consumer protection statutes that are broad enough to cover many instances of the fraudulent sale of nonkosher food, even though they do not identify kosher fraud specifically.²³⁵ For example, most states have deceptive business trade acts that prohibit false advertising and misrepresentation.²³⁶ This includes the behavior of parties who recklessly or willfully offer food for sale as kosher when it is not. Prosecution occurs on the state level, and the power is vested in the attorney general's office. Despite the existence of consumer pro-

231. Certification marks are protected under 15 U.S.C. § 1127 (2002).

232. 15 U.S.C. § 1117(a)-(b) (2002). If the damages are either inadequate or excessive, the court may affix "such sum as the court shall find to be just." *Id.* at § 1117(a). This statute provides statutory damages for counterfeit marks as well. *Id.* at § 1117(d).

233. See *generally* Donel Corp. v. Kosher Overseers Ass'n of Am., Inc., No. 92 Civ. 8377, 2001 WL 228364 (S.D.N.Y. Mar. 8, 2001) (permanently enjoining the KOA from using the letter K inside of a circle).

234. See *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger, U.S.A., Inc.*, 80 F.3d 749, 752 (2d Cir. 1996); *Badger Meter, Inc. v. Grinnell Corp.*, 13 F.3d 1145, 1157 (7th Cir. 1994); *X-It Prods., LLC v. Walter Kidde Portable Equip., Inc.*, 227 F. Supp. 2d 494, 528 (E.D. Va. 2002).

235. For a list of federal statutes relating to the consumer protection mission, visit the Federal Trade Commission home page, at <http://www.ftc.gov/ogc/stat3.htm> (last visited Oct. 6, 2003). For a collection of state consumer protection laws, see Michelle L. Evans, Annotation, *Who Is a "Consumer" Entitled to Protection of State Deceptive Trade Practice and Consumer Protection Acts*, 63 A.L.R. 5th 1 (1998).

236. *Deceptive business practices* include the sale of *mislabeled commodities*. See, e.g., ALA. CODE § 13A-9-41 (2003); ALASKA STAT. § 11.46.710 (Michie 2003); DEL. CODE ANN. tit. 11, § 906 (2003); GA. CODE ANN. § 16-9-50 (2002); HAW. REV. STAT. ANN. § 708-870 (Michie 2003); KY. REV. STAT. ANN. § 517.020 (Banks-Baldwin 2002); ME. REV. STAT. ANN. tit. 17-A, § 901 (West 2003); MO. REV. STAT. § 570.140 (2003); MONT. CODE ANN. § 45-6-318 (2002); N.H. REV. STAT. ANN. § 638:6 (2002); N.J. STAT. ANN. § 2C:21-7 (West 2003); TENN. CODE ANN. § 39-14-127 (2002); TEX. PENAL CODE ANN. § 32.42 (Vernon 2003); UTAH CODE ANN. § 76-6-507 (2003).

tection statutes of general application, there are detailed federal and state consumer protection statutes regulating various industries, including food, cars, drugs, toys, and the like.

2. *The Kosher Fraud Statutes*

Kosher fraud statutes represent a specialized form of consumer protection law aimed at protecting consumers in the kosher food industry. Twenty-two states have enacted kosher fraud laws.²³⁷ This Section briefly details where these laws came from, how they operate, and why they are under judicial attack.

(a) *The History*

The kosher fraud statute developed in New York.²³⁸ The first legislative enactment directed at the kosher food industry occurred in the early 19th century, when Congregation Shearith Israel replaced its shochet.²³⁹ The old shochet continued to sell kosher meat without the Congregation's authorization, and the Congregation was able to convince the city council to pass a resolution limiting the right to sell kosher meat to the trustees of the Congregation.²⁴⁰ It appears that this

237. See, e.g., ARIZ. REV. STAT. §§ 36-941 to -942 (2003) ("Kosher Foods"); ARK. CODE ANN. § 20-57-401 (Michie 2003) ("Kosher Foods"); CAL. PENAL CODE § 383b-c (Deering 2003) (listing kosher meats and meat preparations, sale and labeling regulations, false representations, punishment, defining kosher); CONN. GEN. STAT. ANN. § 53-317 (West 2003) ("Fraudulent sale of kosher meat, meat products, and other food"); GA. CODE ANN. § 26-2-330 (2002) ("Kosher Foods"); 410 ILL. COMP. STAT. ANN. 645/1-2 (West 2003) ("Kosher Food Act"); KY. REV. STAT. ANN. § 367.850 (Banks-Baldwin 2002) ("Kosher Meats or Meat Preparations"); LA. REV. STAT. ANN. § 40:608.2 (West 2003) ("Unlawful practices in sale of kosher food; penalty"); MD. CODE ANN. COMM. LAW § 14-901 to -907 ("Kosher Products") (disclosure statute); MASS. ANN. LAWS ch. 94, § 156 (Law. Co-op. 2003) (listing kosher food, labeling, sale and display, and civil penalties); MICH. COMP. LAWS § 750.297e (2003) ("Kosher food products; definition [of kosher]"; fraudulent sale and marking of foods; investigation; penalty); MINN. STAT. §§ 31.651-661 (2002) ("Kosher Foods"); MO. ANN. STAT. § 196.165 (West 2003) ("Falsely representing food to be kosher prohibited, penalty—kosher defined"); N.J. STAT. ANN. § 2C:21-7.3 to -7.4 (West 2003) (False representation by oral or written statement to make person believe nonkosher food or food product is kosher; presumptive evidence; defense); N.Y. AGRIC. & MKTS. LAW § 201-a to -i (Gould 2003) ("Sale of kosher meat and meat preparations, kosher articles of food and food products"); OHIO REV. CODE ANN. § 1329.29 (Anderson 2003) ("Misrepresentation in sale of kosher foods"; warning before prosecution); 18 PA. CONS. STAT. ANN. § 4107.1 (West 2003) ("Deception relating to kosher food products"); R.I. GEN. LAWS § 21-16-1 (2002) ("Violations or deception as to religious dietary laws by dealers in meats"); TEX. BUS. & COM. CODE ANN. §§ 17.821 to .826 (Vernon 2003) ("Labeling, Advertising, and Sale of Kosher Foods"); VA. CODE ANN. § 18.2-236 (Michie 2003) ("Regulating sale of kosher meat and meat preparations"); WASH. REV. CODE ANN. §§ 69.90.010 to .90.900 (West 2003) ("Kosher Food Products"); WIS. STAT. § 97.56 (2002) ("Kosher meat"). However, Tennessee and the District of Columbia have repealed such kosher fraud statutes. D.C. CODE ANN. §§ 22-5204 to -5206 (2003) (repealed 1982); TENN. CODE ANN. §§ 53-6-101 to -6-102 (2003) (repealed 1983).

238. BERMAN, *supra* note 209, at 286.

239. *Id.* at 285-86.

240. *Id.* at 286.

resolution was not aimed at protecting kosher consumers but rather kosher monopolists who did not want to face the competition of another kosher meat source.²⁴¹

It was not until one hundred years later, though, that the modern kosher fraud statute came to be. During the early 20th century, as technological advances began to exert influence on the food industry, Jewish immigration exploded and kosher fraud became an increasing problem.²⁴² Immigrants, unfamiliar with the language and accustomed to insular Eastern-European communities, trusted that food advertised as *kosher* met the standards of *kashrus*.²⁴³ In the wake of this climate, kosher laws were written into the civil or criminal codes of many states.²⁴⁴ One main force behind the campaign to enact the kosher fraud statutes was the Union of the Orthodox Jewish Congregations of America, the OU, before it entered the supervision and certification business.²⁴⁵

(b) *The Legal Content*

Due to their common origin, the New York kosher fraud law,²⁴⁶ most kosher fraud statutes operate in a similar fashion and have identical or similar provisions. The statutes define what they mean by kosher, include steps that must be taken to ensure that consumers are not misled, identify the intent required for a violation, and proscribe an enforcement mechanism.²⁴⁷ As an organizational matter, some of these statutes appear in state criminal codes, while others are part of the

241. *See id.*

242. 1900-1920 represents the largest wave of Jewish immigration to the United States. AM. JEWISH HIST. SOC'Y, *supra* note 209, at 35. In 1890, the Jewish population in the United States was slightly less than one half of a million people. *Id.* By 1900, this amount doubled to approximately 1 million, and by the 1920s, when the problem of kosher fraud reared its ugly head, the Jewish population had more than tripled to an estimate of 3.5 million people. *Id.* For a thorough discussion of the history of the New York kosher fraud statute, see HAROLD P. GASTWIRT, *FRAUD, CORRUPTION, AND HOLINESS: THE CONTROVERSY OVER THE SUPERVISION OF JEWISH DIETARY PRACTICE IN NEW YORK CITY 1881-1940*, at 124-46 (1974).

243. GASTWIRT, *supra* note 242, at 22.

244. Before 1950, statutes were enacted in states such as: New York (1915), Massachusetts (1929), Pennsylvania (1929), Wisconsin (1935), Rhode Island (1937), and Michigan (1939). *See* FREEDMAN, *supra* note 15, at 65. While the list of states with kosher fraud laws includes the states with some of the largest Jewish populations, such as New York and California, a few of the states with these laws have incredibly small Jewish populations. *See* Jim Schwartz & Jeffrey Scheckner, *Jewish Population in the United States, 2001*, in 102 AMERICAN JEWISH YEAR BOOK 247, app. tbl. 1 at 254-55 (David Singer & Lawrence Grossman eds., 2002), available at American-Israeli Cooperative Enterprise, Jewish Virtual Library, *Jewish Population of the United States by State*, <http://www.us-israel.org/jsource/US-Israel/usjewpop.html> (last visited Oct. 9, 2003). For example, the 1700 Jews in Arkansas represent a mere 0.1 % of Arkansas's population. *Id.*

245. BERNSTEIN, *supra* note 72, at 185.

246. *See supra* Section III.C.2.(a).

247. *See* statutes cited *supra* note 237.

state codes on public health and welfare, food regulation, or commerce and trade.²⁴⁸

The kosher fraud statutes define kosher by referring to the standards of *kashrus* in some way. The Illinois Kosher Food Act, for example, defines kosher as food that is “sanctioned by the Code of Jewish Laws.”²⁴⁹ In this regard, Illinois is an outlier. The New York kosher fraud law defines kosher by referencing “the orthodox Hebrew religious requirements”²⁵⁰ and nearly all the other states with such laws use the same or similar phrasing.²⁵¹

Many of the statutes not only prohibit nonkosher food falsely represented to be kosher but also impose affirmative duties on vendors who sell kosher food.²⁵² These tasks include registering the name and address of the KSA and posting signs differentiating between kosher and nonkosher meat, when both products are sold.²⁵³

Most kosher fraud statutes require specific intent to defraud, or knowledge.²⁵⁴ Yet, the New York statute also states that, “[p]ossession of non-kosher meat and food, in any place of business advertising the sale of kosher meat and food only, is presumptive evidence” that the vendor sells nonkosher food with intent to defraud.²⁵⁵ An old New Jersey law contained a similar provision.²⁵⁶ The penalty for violating the

248. The California, Connecticut, Michigan, New Jersey, Pennsylvania, and Virginia kosher fraud statutes appear in criminal codes; the Kentucky, Maryland, Ohio, and Texas statutes are organized with other laws of commerce and trade; Minnesota and New York feature statutes that fall under the department of agriculture; and the remaining statutes (Arizona, Arkansas, Georgia, Illinois, Louisiana, Missouri, Rhode Island, and Washington) are grouped with public health laws. *See id.*

249. 410 ILL. COMP. STAT. ANN. 645/1 (West 2003).

250. N.Y. AGRIC. & MKTS. LAW § 201-a (Gould 2003).

251. *See, e.g.*, ARK. CODE ANN. § 20-57-401(1) (Michie 2003); CAL. PENAL CODE § 383b (Deering 2003); CONN. GEN. STAT. ANN. § 53-317(a) (West 2003); GA. CODE ANN. § 26-2-330(2) (2002); KY. REV. STAT. ANN. § 367.850(1) (Banks-Baldwin 2002); LA. REV. STAT. ANN. § 40:608.2(1) (West 2003); MASS. ANN. LAWS ch. 94 § 156(a)(1) (Law. Co-op. 2003); MICH. COMP. LAWS § 750.297e(1) (2003); MINN. STAT. § 31.651(1) (2002); MO. ANN. STAT. § 196.165 (West 2003); OHIO REV. CODE ANN. § 1329.29(A)(1) (Anderson 2003) (“Orthodox Hebrew religious requirements”); VA. CODE ANN. § 18.2-236 (Michie 2003). For variations, see 18 PA. CONS. STAT. ANN. § 4107.1(b) (West 2003) (“the requisites of traditional Jewish law”); R.I. GEN. LAWS § 21-16-1(1) (2002) (“the traditional or orthodox Hebrew religious requirements and dietary laws”); TEX. BUS. & COM. CODE ANN. § 17.821(1) (Vernon 2003) (“orthodox Jewish religious requirements”); WASH. REV. CODE ANN. § 69.90.010(2) (West 2003) (“requisites of traditional Jewish dietary law”); WIS. STAT. § 97.56(2)(a) (2002) (“orthodox Hebrew religious requirements”).

252. *See, e.g.*, WIS. STAT. ANN. § 97.56(2)(c) (West 2002) (prohibiting the sale of both kosher and nonkosher food unless there are signs stating, “in block letters at least 4 inches in height, ‘Kosher and Nonkosher Meat Sold Here’”). This requirement is copied directly from the New York kosher fraud statute. *See* N.Y. AGRIC. & MKTS. LAW § 201-a(1) (Gould 2003).

253. *See* N.Y. AGRIC. & MKTS. LAW § 201-a(1)-g (Gould 2003).

254. *See* statutes cited *supra* note 237. *See generally* Masoudi, *supra* note 11, at 672-73.

255. N.Y. AGRIC. & MKTS. LAW § 201-a(1) (Gould 2003).

256. N.J. ADMIN. CODE tit. 13, § 45A-21.6 (2003) (same title and section as current version).

statutes can be fines or even imprisonment.²⁵⁷ Some statutory schemes vest the power to inspect whether food retailers are complying with the law in the attorney general, a commission, or a special agency.²⁵⁸ In the few places such a commission exists, local rabbis often serve as officials.²⁵⁹

(c) *The Constitutional Question*

The first constitutional challenge to a kosher fraud statute was not brought on First Amendment grounds, but rather on the grounds that the term *kosher* was impermissibly vague.²⁶⁰ In *Hygrade*, the Supreme Court upheld the New York kosher fraud statute, finding that *kosher* was not so indeterminate as to present a violation of the Due Process Clause.²⁶¹ *Hygrade* did not deal with the Establishment Clause, since it predated the application of the First Amendment to states.

Over the last ten years, three courts—the Second Circuit,²⁶² Fourth Circuit,²⁶³ and New Jersey Supreme Court²⁶⁴—have invalidated kosher fraud statutes on Establishment Clause grounds. Most notably, though, was the Second Circuit’s decision, in May 2002, to strike down the New York state kosher fraud law, the law that served as the model for the rest of the states.²⁶⁵ Just as the New Jersey Supreme Court and Fourth Circuit had previously held, the Second Circuit in *Commack* invalidated New York’s kosher fraud statute because it had the primary effect of advancing religion and creating excessive government in-

257. See, e.g., 410 ILL. COMP. STAT. ANN. 645/2 (West 2003) (violation of the act constitutes either a Class C or a Class A misdemeanor). The penalties vary from state to state. Compare ARK. CODE ANN. § 20-57-401(3) (Michie 2003) (violation “is guilty of a misdemeanor and punishable by a fine of not more than five hundred dollars (\$500) or by imprisonment of not less than thirty (30) days or not more than six (6) months”) with MASS. GEN. LAWS ANN. ch. 94, § 156(3)(h) (West 2003) (“civil penalty or fine of not less than five hundred dollars and not more than two thousand dollars”). The New Jersey statute that was invalidated set a maximum fine of \$2000 for a first offense and up to \$5000 for subsequent offenses. *Ran-Dav’s County Kosher, Inc. v. State*, 608 A.2d 1353, 1357 (N.J. 1992). It also permitted injunctions against offenders. See *id.* Not every statute specifically designates the penalty for a violation. See Greenawalt, *supra* note 189, at 787-88 (noting that “[m]uch enforcement of kosher requirements is private”); Lindsay, *supra* note 11, at 346.

258. See, e.g., MASS. GEN. LAWS ANN. ch. 94, § 156(3)(g) (West 2003) (granting the attorney general the power to investigate during business hours); MICH. COMP. LAWS § 750.297(e)(5) (2003) (granting the department of agriculture the power to “investigate, inspect and supervise”); Greenawalt, *supra* note 189, at 788 (noting that a “state could undertake direct enforcement with inspections”).

259. See *infra* note 273. See generally Lindsay, *supra* note 11, at 343.

260. *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 501 (1925).

261. *Id.* at 501-02; see also *Erlich v. Mun. Court*, 360 P.2d 334 (Cal. 1961) (upholding the California kosher fraud statute against a *void for vagueness* challenge).

262. *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 1250 (2003).

263. *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337 (4th Cir. 1995).

264. *Ran-Dav’s County Kosher, Inc. v. State*, 608 A.2d 1353 (N.J. 1992).

265. See *Commack*, 294 F.3d at 432.

volvement in religious matters,²⁶⁶ thus violating the second and third prongs of the *Lemon* test.²⁶⁷

The facts of all three cases demonstrate the wide array of behavior captured by the kosher fraud laws and shed light on the reason the laws were invalidated. In *Barghout*, the vendor, who did not obtain any private KSA certification, cooked kosher hot dogs alongside nonkosher hot dogs on the same grill.²⁶⁸ This practice would strike any sophisticated kosher consumer as problematic due to the rules of transference and absorption, while it might not disturb some proxy-using kosher consumers at all.²⁶⁹ The *Commack* plaintiffs obtained private supervision and certification from a Conservative rabbi (Rabbi Berman), who asserted that the procedures the state alleged to be violations of the law (some technical rules of soaking/salting meat) were permissible under Jewish law.²⁷⁰ And in *Ran-Dav's*, the plaintiff was supervised and certified by a private KSA ("Orthodox Kashruth Supervision Services"²⁷¹), and Rabbi Harry Cohen, the KSA administrator who regularly inspected the business at least twice a week unannounced, maintained that the business establishment was kosher despite the alleged violations.²⁷²

The contentious parts of the statutes in all three cases were that the states or local governments specifically employed rabbis as state-appointed officials,²⁷³ and that the kosher fraud law expressly defined kosher to mean "Orthodox."²⁷⁴

266. *Id.* at 425 (merging the analysis of excessive entanglement into the effects inquiry as per *Agostini v. Felton*, 521 U.S. 203, 233 (1997)); see *Ran-Dav's*, 608 A.2d at 1365; see also *Barghout*, 66 F.3d at 1344-46.

267. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

268. 66 F.3d at 1339.

269. See *supra* text accompanying notes 52-61 and 176-78.

270. 294 F.3d at 420.

271. Note the similarity of the name to the OK ("Organized Kosher Laboratories"). See *supra* text accompanying note 90.

272. *Ran-Dav's County Kosher, Inc. v. State*, 579 A.2d 316 (N.J. Super. Ct. App. Div. 1990), *rev'd*, 608 A.2d 1353 (N.J. 1992). Part of the conflict in *Ran-Dav's* was the *presumptive effect* of possession of impermissible foods. *Id.* at 321. On appeal from the trial court, the plaintiffs were not arguing that they followed alternative accepted practices of kashrus. *Id.*

273. The current Chief of the Bureau of Kosher Enforcement (Division of Consumer Affairs) in New Jersey is a rabbi, but his predecessor was not, and he employs inspectors who are not rabbis and in some cases are not Jewish. *Id.* at 320. In addition, the Attorney General created a kosher advisory committee comprised of all Orthodox rabbis, save one member who is a Conservative rabbi. *Id.* The Baltimore ordinance created the "Bureau of Kosher Meat and Food Control," which was required to include "three duly ordained Orthodox Rabbis and three laymen selected from a list submitted by 'The Council of Orthodox Rabbis of Baltimore' and 'The Orthodox Jewish Council of Baltimore.'" *Barghout*, 66 F.3d at 1339. And last, the director of the Kosher Law Enforcement Division of the New York State Department of Agriculture and Markets is a rabbi. *Commack*, 294 F.3d at 418.

274. See *Ran Dav's*, 579 A.2d at 319.

While New Jersey replaced its invalidated kosher fraud statute with a new form of law, the kosher disclosure statute,²⁷⁵ the *Com-mack* decision has created an uproar in New York.²⁷⁶ Within one week after the Supreme Court denied the petition for certiorari,²⁷⁷ the Governor had already proposed legislation (the “Emergency Kosher Law Protection Act of 2003”) to replace the old kosher fraud statute.²⁷⁸ This proposal combines the disclosure model with a requirement that kosher be defined by “the reasonable expectations” of consumers of kosher products and generally accepted standards in the trade.²⁷⁹ To aid in this task, the proposed law would create an advisory board of kosher consumers, producers, distributors, and other persons interested in maintaining the integrity of kosher trade standards.²⁸⁰ Though not all parties involved support the Pataki proposal, there is a widespread belief within the kashrus world that some reenactment of the kosher fraud law is necessary to protect consumers.²⁸¹

275. N.J. STAT. ANN. § 56:8-63 (West 2003). The “Regulations Governing the Sale of Food Represented as Kosher” can be found at N.J. ADMIN. CODE tit. 13, § 45A-21.1 to -21.8 (2003). The idea of a disclosure statute was proposed by the court in *Ran-Dav’s*, 608 A.2d at 1366-67.

276. See, e.g., Press Release, N.Y. Gov. George E. Pataki (Feb. 24, 2003), available at http://www.state.ny.us/governor/press/year03/feb24_03.htm (last visited Oct. 9, 2003). Pataki stated:

I am deeply disappointed that the U.S. Supreme Court has failed to review the decision of the U.S. Court of Appeals for the Second Circuit declaring certain provisions of New York’s kosher laws unconstitutional. Our State’s kosher laws are vitally important to tens of thousands of New Yorkers of all faiths and have protected generations of consumers from fraudulently packaged and misbranded products.

I remain strongly committed to protecting New Yorkers who consume kosher products, and will promptly seek remedial legislation to ensure that those who purchase products labeled as kosher receive the full protection of our laws.

Id.; Jewish Law, Recent Developments, *Agudath Israel Reacts to Kosher Laws Ruling*, at <http://www.jlaw.com/Recent/kosherlawsruling.html> (last visited Oct. 18, 2003).

277. The application of current Establishment Clause doctrine to the kosher fraud statute seems to be fairly obvious and routine. *Cf.* Meacham, *supra* note 11, at 641-43 (arguing that protecting consumers from fraud is a secular purpose and fits within the principles of *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); Rosenthal, *supra* note 11, at 952, 1003 (arguing non-endorsement); Sullivan, *supra* note 11, at 207-08 (arguing that kosher fraud laws further a state interest).

278. Press Release, N.Y. Gov. George E. Pataki, Governor Pataki Proposes New Kosher Foods Legislation (Feb. 26, 2003), available at http://www.state.ny.us/governor/press/year03/feb26_2_03.htm (last visited Oct. 10, 2003); Andrew Metz, *Pataki Proposes New Kosher Law*, NEWSDAY, Feb. 27, 2003, at A14 (declaring that the new law is not expected to be dramatically different from the old one).

279. Metz, *supra* note 278.

280. See *id.* This Article declines to comment whether the Pataki plan would clear the constitutional bar.

281. See, e.g., Tzivia Emmer, *High Court Says No to State Kosher Laws, Silver Announces Conference to Plan New Legislation*, JEWISH PRESS, Feb. 26, 2003 (explaining that the New York State Assembly Speaker is planning a conference in mid-March to discuss new legislation), available at http://www.thejewishpress.com/news_article.asp?article=2131. *But see* Metz, *supra* note 278 (quoting the president of the New York Board of Rabbis as

IV. HOW EFFECTIVE ARE THE VARIOUS SANCTIONS: THEORY VS. PRACTICE

Multiple layers of enforcement aim to protect consumers of kosher food. On the surface, it would not necessarily be clear which protections best combat the problem of fraud in the kosher food industry. In light of this complicated situation, it is particularly troublesome that those advocating the reenactment of kosher fraud laws have not analyzed the effects of these statutes in protecting consumers of kosher food compared with the effects of other available sanctions.

This Section first examines whether economic theory predicts that the kosher fraud statute would play a significant part in combating fraud within the kosher food industry, given the choice of available enforcement mechanisms. Then, it offers an evaluation of the overall amount of fraud, the degree of mistake within the food industry, the problems and challenges various industry players perceive, and the manner in which kosher fraud has been policed and monitored. This analysis suggests that the kosher fraud statute is merely another auxiliary, and usually unnecessary, aid to a group of kosher consumers that already receives a great amount of protection from instances of fraud. Last, this Section proposes a centralized information bank that could better aid kosher consumers and discusses the possible effects of the kosher disclosure statute, which has replaced the kosher fraud statute in New Jersey.

A. Predictions About the Market

1. The Profit Motive & the Detection Problem

The market for kosher food has a built-in incentive rewarding fraudulent behavior. Consumers are willing to pay a premium for food that is deemed kosher. Also, given the choice between two identically priced food products, many will select the kosher item.²⁸² Some businesses choose to take advantage of kosher's premium price and reputation. Manufacturers and retailers who do not purchase kosher ingredients, who do not take the necessary precautions to ensure that food is kosher, or who do not actually obtain certification can collect this premium for kosher products without paying these associated costs. Furthermore, the unscrupulous suppliers or vendors are then at an advantage, when compared to the vendors following the rules, and can undercut the prices of honest competitors.

stating that the main problem is "an unhealthy entanglement between state and religion . . . We should be overseeing kashrut standards for our own people").

282. See *Ran-Dav's County Kosher, Inc. v. State*, 608 A.2d 1353, 1356 (N.J. 1992).

This profit motive, however, describes nearly every industry. Unscrupulous sellers can cut costs by delivering products that do not meet the required standards. What makes kosher fraud any more likely than other forms of fraud such that it warrants special attention? The answer lies in the ability to detect the fraud perpetrated. If a retailer sells a color television, the consumer can readily see if the television indeed offers a color picture. A fraudulent attempt to substitute a cheaper, black and white television for a color one would not last very long.

On the contrary, the fraudulent sale of nonkosher food under the guise that it is kosher, which is kosher fraud, is attractive because of consumers' inability to detect the nonkosher or kosher status of food simply by looking at it or by chemically testing it.²⁸³ The very same difficulty that gave rise to the certification subindustry also creates the incentive for fraud. In addition, given that mistakes about the kosher status of food also occur, not only is it difficult to detect instances of fraud, but it is even more difficult to prove that a particular example of nonkosher food being substituted for kosher food was an intentional act and not an accident.

Lastly, the exit from the kosher food industry and reentry into the general food industry population can be smooth. For instance, a retailer who fraudulently vends televisions that do not perform as promised may have difficulty starting a new business anywhere in the electronic retail world; where as, it seems, someone discovered as a fraudulent vendor within the kosher food industry could continue to sell nonkosher food quite easily. The reputation mechanism does not follow the merchant across industry lines. Furthermore, there is no indication that the kosher food subindustry is more supra-competitive than the food industry as a whole. So, it is not clear what the *cheater* gives up by losing access to the kosher food market.²⁸⁴ As a result, it is not clear that the kosher food market produces as great a penalty for trying to act fraudulently and getting caught as other markets might.

2. *The Expected Deterrence Effects of the Various Sanctions*

Taken on its own, the effectiveness of each enforcement mechanism could be measured by the amount of fraud deterrence it creates. Overlapping sanctioning systems with different penalties and detection abilities substantially complicate this theoretical analysis. Some fraud

283. A salt-content test can reveal that a meat or poultry product is not kosher. Interviews with KSA representative and food scientist (Fall 2002) (for interview clarification see *supra* note 5). Presence of a sufficient level of salt, on the other hand, may be indicative of the kashering procedure, but it does not prove that the item is kosher. *Id.*

284. There is a theory that even in a perfectly competitive market, firms compete over volume. Since the manufacturers of kosher food are often competing for sales to both kosher consumers and all other consumers, a cheating manufacturer or retailer might forfeit volume by losing the kosher sales.

will be caught and punished by any number of the sanction choices. If one sanction were removed, another sanction might step in against the perpetrator.

To illustrate, imagine there are two sanctions available: Sanction System 1 (SS1) and Sanction System 2 (SS2). SS1 discovers and penalizes seventy-five percent of the total discovered fraud perpetrators and SS2 discovers and penalizes the remaining twenty-five percent of known fraud perpetrators. One might be tempted to say that SS1 is more effective than SS2 at discovering and penalizing fraud. However, one could not make this claim without more information about the level of penalty involved or the comparative costs of operating each system (including the investigative element that uncovers the fraud). Even worse, what if SS2 is duplicative of SS1 and would have uncovered the same amount of fraud in the absence of SS1?

Any analysis of the kosher food industry setup must take into account these three problems—the comparative cost of operation, the relative penalty extended, and the ability to avoid duplication—in order to accurately measure the expected deterrence effects of the relevant legal and nonlegal sanctioning mechanisms. This Section compares the relative merits of the four enforcement choices available (nonlegal monitoring and reputation sanctions, private law remedies, general consumer protection laws, and kosher fraud statutes) as best as possible, given the constraints listed above.

(a) *Comparative Cost of Operation*

Nonlegal sanctions require no financial commitment from the state, but that does not mean they are costless. KSAs include the cost of supervision and investigation as part of their fees.²⁸⁵ Private monitoring agencies harness the power of consumer investigators, and the cost of publishing their results is borne by the consumers and kosher food manufacturers who choose to advertise.²⁸⁶ Reputation harm sanctions are distributed internally within a subset of the community of kosher consumers with only the transaction costs of information sharing.

Private law remedies are a bit more costly to the state and especially to the individuals or organizations pursuing their interests. The availability of the judicial system as an avenue of adjudication imposes some cost. Far greater are the attorney fees and court-related costs that the parties wishing to litigate a case in contract, tort, or trademark infringement would incur. The opportunity to set-

285. Interview with various KSA representatives (Fall 2002) (for interview clarification see *supra* note 5); see EIDLITZ, *supra* note 14, at 8-9, 12-15.

286. Interview with consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

tle or seek arbitration (particularly through the rabbinical courts) acts to lower these costs.

Consumer protection laws require an even greater commitment of state resources, since not only does the judiciary avail itself of dispute resolution, but the state or local government must prosecute the action as well. To the extent that kosher fraud statutes set up investigation agencies and boards, protecting the kosher consumer costs even more.

To compare the *cost of operation*, though, one must ask who incurs the cost? Do private costs count the same as expending state resources? When kosher consumers, certifiers, and watchdog groups expend resources trying to monitor, investigate, and distribute information, the costs are borne by the parties being protected. Any form of state enforcement directly targeting the kosher food industry is a subsidy for these parties, and the burden is shared by all taxpayers.

There are two lenses through which this subsidy can be viewed. In one framework, based on a theory of criminal law, the kosher food industry warrants extra protection because it is an area in which problems of fraud were, or are, replete.²⁸⁷ General theories of criminal and civil enforcement suggest that it is the province of the state to police wrongdoers when: (1) any one individual has an incentive to free ride off the monitoring and sanctioning efforts of others, (2) discovering the wrong and stopping the harm would be likely to escalate to physical violence, or (3) there is a communal need to express disapproval for bad behavior.²⁸⁸

The alternate model is to view the kosher fraud law purely through the public choice lens that presents it as a state subsidy obtained by key kosher food industry players as successful participants within the political process.²⁸⁹ Under this view, the allocation of state resources to aid consumers of kosher food is essentially a given. Kosher fraud laws are merely the form of subsidy requested and obtained.

Thus, forming an opinion about the appropriate legal response in the face of the kosher private ordering may depend on through which lens such regulation is viewed. Yet through either lens, any statute that does not achieve its purported goals is suspect.

(b) *The Nature of the Penalty*

Much like the cost, the severity of the sanctions also varies from one level of enforcement to the next. Even within each sanctioning scheme, the penalty can range from a business death penalty to practically

287. See Berman, *supra* note 11, at 14.

288. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 419-35 (1999) (describing different theories for criminal punishment).

289. Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1439-41 (2003).

nothing.²⁹⁰ As a result, the litany of sanctions available is meaningless without an actual idea of what penalties are actually imposed.

Nonlegal sanctions may be just as severe as legal ones, depending on the importance of reputation and the access to information within the industry. In some cases, nonlegal sanctions are the most important check on bad behavior.²⁹¹ Thus, they can do nothing at all or destroy an entire business on the basis of one errant incident.

Private law remedies may force wrongdoers to pay anywhere from the kosher premium extracted to the entirety of the profits received from a wrongful act and perhaps punitive damages as well.²⁹² Consumer protection laws can be used to impose fines, jail time, or a permanent injunction against a business.²⁹³ Kosher fraud statutes also offer fines and jail time for offenders.²⁹⁴

(c) *Duplication Among Sanctioning Systems*

In some regard, all three tiers of enforcement aim to capture the problem of fraud within the kosher food industry. Duplicative efforts are fairly likely, but there are significant differences too. For example, the nonlegal sanctions do not create a remedy for the consumer victims of a past wrongdoing. The kosher fraud statute and some consumer protection laws do not create such a remedy either, only private law remedies would.

The trumping characteristic, though, is that the kosher fraud statute in many ways applies to a subset of cases already covered by general consumer protection laws. As a result, its sanctioning mechanism (as opposed to its monitoring tools) is duplicative of other sanctioning systems. And to the extent the kosher fraud statute seeks to discover and punish behavior that the other sanctioning systems leave untouched, it is not clear that the laws are capturing willful fraud in the kosher food industry.²⁹⁵

290. Interviews with various KSA representatives (Fall 2002) (for interview clarification see *supra* note 5).

291. See sources cited *supra* notes 212-14 and accompanying text.

292. See *supra* Section III.B.1.

293. See *id.*

294. See statutes cited *supra* note 237.

295. Note that the plaintiffs in *Ran-Dav's* and *Commack* had obtained supervision and certification from KSAs that insisted on the kashrus of the food (even though these KSAs were not acceptable by the Orthodox mainstream). *Ran-Dav's County Kosher, Inc. v. State*, 608 A.2d 1353, 1357 (N.J. 1992); *Commack Self-Serv. Kosher Meats, Inc. v. Rubin*, 106 F. Supp. 2d 445, 448 (E.D.N.Y. 2000), *aff'd*, 294 F.3d 415 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 1250 (2003).

*B. Evaluating the Market*²⁹⁶

1. Observations About Enforcement

(a) Tier One: The Nonlegal Sanctions

Private or nonlegal enforcement (Tier One) is robust. KSAs and vigilant consumers working in conjunction with the KSAs, other industry monitors, or simply by themselves, monitor packaged food products and food establishments to examine whether items in question have appropriate kosher certification. Throughout this Article, the entire kosher food industry has been treated as one entity. To better understand how the private monitoring and sanctioning efforts work, though, it is important to bifurcate the market into two segments—packaged versus prepared food. Packaged, or manufactured, food is what we find on the shelves of supermarkets and grocery stores. The bulk of kosher products fit into this category. Prepared food, on the other hand, is sold independent of any packaging. This can include the food from restaurants, bakeries, caterers, or butcher shops.

i. KSA Activity

Much of the monitoring of kashrus in both the packaged and prepared kosher food subindustries comes from the KSAs themselves. First and foremost, the KSA is responsible for monitoring and sanctioning its own clients, and thus, can find problematic behavior through surprise visits.²⁹⁷

KSAs who catch instances of mistake or fraud (whether accidental, negligent, reckless, or willful) from their own clients require that the client take corrective action.²⁹⁸ Companies that repeatedly err, ignore the KSA's instructions, or engage in fraudulent behavior are dropped.²⁹⁹ One KSA administrator explained that it is important to search the garbage at the beginning and end of the visit, because it allows the KSA to see what the company normally disposes (wrappers, scraps, receipts, etc.) as well as what the company did not want the KSA to see.³⁰⁰ The requirements of notification through trade publications, other sources commonly read by kosher consumers, and product recall in the face of a mistake, are sometimes delineated via the initial

296. Much of the information in Section IV.B was obtained via the interviews referred to in note 5.

297. See EIDLITZ, *supra* note 14, at 13.

298. See *id.* at 14.

299. Interviews with various KSA representatives (Fall 2002) (for interview clarification see *supra* note 5).

300. Interview with KSA representative (Fall 2002) (for interview clarification see *supra* note 5).

contract between the KSA and client.³⁰¹ In other circumstances, the KSA may demand corrective action as a condition of future dealing.³⁰²

KSAs can be forgiving of their clients' mistakes if steps are taken to rectify the situation and the problems are not indicative of gross disregard for the kashrus of the product.³⁰³ Willful fraud, on the other hand, is unforgivable. For example, when an OU supervisor caught one set of clients, the owners of two New York City restaurants, hiding nonkosher chicken in the kitchen, the OU dropped its certification and supervision of the restaurants.³⁰⁴ In the face of such blatant fraud, no other KSA would agree to pick up the clients.³⁰⁵

Another interesting case occurred in 1990, when the supervisor for the Rabbinical Council of Greater Washington (which serves as a KSA among other functions) found allegedly nonkosher ducks and receipts from a nonkosher supplier at Moshe Dragon, a Chinese restaurant the KSA supervised.³⁰⁶ The Rabbinical Council eventually cleared the restaurant owner of any wrongdoing and fired its own supervisor, contrary to the findings of a private investigator working on the case.³⁰⁷ Nonetheless, word of the dispute spread through the "Washington Jewish Week" and another local business publication even undertook to analyze some of the food, searching for (impermissible) traces of whey.³⁰⁸ The restaurant owner claimed that he lost over \$30,000 as a result of the rumors and decided to sell the business.³⁰⁹

Often, though, it is difficult to ascertain if an error is the result of fraud or mistake. Given the liability potential and ambiguity of the term *kosher* within any legal context, a KSA dropping a client usually will not declare a product, line of products, or food establishment to be not kosher. Instead, a KSA will announce that it no longer certifies *Product A or Restaurant B*.³¹⁰ The KSA declares that due to the fact that it will not be supervising the manufacturer or retailer, it can no longer certify that the food is kosher. KSAs save retroactive decertification for instances in which particularly egregious conduct leaves the

301. See EIDLITZ, *supra* note 14, at 12-15.

302. Interview with various KSA representatives and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

303. *Id.*

304. *Id.*

305. *Id.*

306. Ruth Sinai, *Is Everything Kosher with Moshe Dragon's Duck?*, ASSOCIATED PRESS, July 4, 1990, available at 1990 WL 6012694.

307. *Id.*

308. *Id.*

309. *Id.*; see also Eugene L. Meyer, *Dispute Blamed in Sale of Restaurant; Chinese Kosher Eatery's Business Fell After Inspector's Allegation*, WASH. POST, June 22, 1990, at D06, available at 1990 WL 2124618 (stating that owner wants to stay in business but cannot afford to).

310. Interviews with various KSA representatives and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

KSA with little to no doubt that a product cannot be deemed kosher even during the time in which the KSA was contracted to supervise and certify the food.³¹¹ Retroactive decertification is mostly limited to the packaged food industry, due to the difference in shelf life of the products.³¹² In both instances, prospective and retroactive decertification, the KSA neither expressly confirms nor denies whether the food actually is kosher.

Prospective and retroactive decertification create different reputation effects. Retroactive decertification severely harms the reputation of the food manufacturer. No KSA likes to be in the position of having to declare a product not kosher after the fact, because it undermines consumer confidence in the kashrus of all of the food that the KSA supervises and certifies. Thus, KSAs rarely employ this sanction, and once they do, other KSAs are quite unwilling to agree to contract with that manufacturer for future certification.³¹³

Prospective decertification has less effect on product or establishment reputation, particularly because it is fifty percent of the steps needed to switch to a different KSA. Independent food monitors reporting these decertifications attempt to give full opportunity for the company or a new KSA to declare if a new certifier has been hired.³¹⁴ This way, ideally, the kosher alert section does not state, "KSA X no longer certifies Product 1," but would be paired with the relevant information on Product 1; for example, "KSA Y will now certify Product 1."³¹⁵ Occasionally, since newly certified products are self-reported to the watchdog groups, there can be a gap in reporting a switch in supervising agencies, and only a statement of decertification will be published, with some negative implication against the manufacturer or establishment.³¹⁶

KSAs also must pass judgment on the standards of one another to perform their tasks properly. Vertical product integration requires a KSA either to accept or reject the supervision and certification of all the KSAs that may happen to precede it on the food chain. As a result, one KSA will have to call up other KSAs to inquire about their standards and requirements.³¹⁷ To justify its decision whether to certify, the KSA will necessarily have to announce to the client, at a minimum, that it deems the products of another KSA to be kosher. In the alternative, the KSA will have to announce to the client that, based on the standards

311. *Id.*

312. *Id.*

313. *Id.*

314. Interview with a consumer watchdog (Fall 2002) (for interview clarification see *supra* note 5).

315. *Id.*

316. *Id.*

317. Interviews with various KSA representatives (Fall 2002) (for interview clarification see *supra* note 5).

and activities of the other KSA, it can neither confirm nor deny the kashrus of the food.³¹⁸

Information about general standards and bad actors is fluid between KSAs. Not only do the individuals involved in the KSAs work with one another professionally, sponsoring joint lectures on common areas like food technology, but they also share information through their participation religiously and socially within the Orthodox Jewish community.³¹⁹ As a result, KSA sanctions against parties known to have perpetuated fraud are death-penalty like. Companies caught in the act of deliberately switching a nonkosher food source for a kosher one or intentionally ignoring known plant or store requirements and problems do not continue to exist within the kosher food industry.

ii. Consumers and Consumer Watchdogs

The kosher food industry features a unique group of sophisticated consumers, who vigilantly attempt to identify mistake and fraud within the food industry.³²⁰ These consumers represent a minority of all kosher consumers and engage in behavior off which others can free ride.³²¹ Since consumers are denied access to the manufacturing process, it might seem surprising the extent to which some consumers are able to spot instances of mistake or fraud simply by contacting KSAs or watchdog groups when they find a new or otherwise suspicious certification on a product.³²² Spotting examples of mistake or fraud is somewhat easier for consumers in the prepared food subindustry. Much of the kosher fraud enforcement originates with some observation, question, or tip directly from a kosher consumer.³²³ This is particularly unusual given the minimal financial incentive for any one consumer to seek out wrongdoing and the free riding incentive. It seems unlikely that the ten dollar reward offered by *KASHRUS MAGAZINE* overcomes the inherent problem of free riding.³²⁴

Even greater than their ability to monitor the kosher food industry to prevent violations, though, are the sanctions that kosher consumers can impose on wrongdoers. The kosher consumers who are observant Jews can and do effectuate boycotts of fraudulent vendors of kosher food, using the internal network of the Jewish community, such as an-

318. *Id.*

319. Interviews with various KSA representatives and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

320. See *Consumer Alert*, *KASHRUS MAG.*, Sept. 1990, at 7, 7-18.

321. See *id.*

322. See *id.*

323. Interviews with various KSA representatives and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

324. See *Be a Kashrus Watcher*, *supra* note 147, at 6 (offering ten dollars for evidence of a mislabeled or unauthorized kosher product).

nouncements and postings in synagogues, to spread information about questionable food manufacturers and retailers.³²⁵

One concern with the nature of the private activity would be over-vigilance. Accidental sales of nonkosher food as though it were kosher is just as harmful to nearly all kosher consumers as willful fraud.³²⁶ Yet, while the private enforcers care to find instances of mistake, it does not appear that one-time perpetrators of mistakes suffer sanctions.³²⁷ At the same time, the Moshe Dragon incident suggests that once consumers learn that a KSA has reason to believe a client acted improperly, they may not accept the food from that vendor as kosher, even in the face of KSA exoneration.³²⁸

This disconnect between KSA and consumers may have positive effects, such as preventing the KSAs from acting in concert with their clients to the detriment of consumers a la Enron.³²⁹ On the other hand, it may deter KSAs from providing information to consumers in the first place until the KSA can confirm its findings. In this respect, a background religious limitation on gossip or slander affects both KSA and consumer behavior. One who destroys the reputation of another is analogized to one who has spilled blood.³³⁰ While this religious principle excepts out cases where failure to share information would be harmful, including the potential for financial loss, its existence might act to chill some information sharing. To the extent the KSAs or consumers adhere to this law, it limits the amount of information available, but it only serves to strengthen the effects of reputation mechanisms. That is, once information is released, it is more likely to be accepted precisely because it has already cleared the hurdle of improper slander.

(b) *Tier Two Enforcement: Private Law Remedies*

While some consumers are actively engaged in seeking out instances of fraud or mistake, there were no reported cases of consumer initiated private law actions in tort or contract (tier two enforcement).³³¹ Various

325. Interviews with consumers and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5). Not all the information shared is *bad news*. Contrast kosher fraud with the announcements in favor of new kosher establishments or products certifications, like M&Ms or Oreos, information that was happily received and spread by kosher consumers. *Id.*

326. That is, if consumers themselves are not negligent, the vendor's intent does not mitigate the harm to consumers.

327. Interviews with various KSA representatives, consumers, and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

328. See Meyer, *supra* note 309.

329. One interesting question presented is whether the nonprofit status of the KSAs minimizes the risk of self-serving practices.

330. *Leviticus* 19:16 ("You shall not be a gossipmonger among your people . . .").

331. Interviews with various KSA representatives and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

members of the industry attribute this to the high cost of litigation and uncertainty concerning damages available.³³²



Though some KSAs (especially the Big Four) aggressively pursue unauthorized usages of their trademarks, actual litigation of these issues is quite rare.³³³ In one notable exception, the OK brought suit seeking to enjoin the Kosher Overseers Association (KOA) from using an encircled half-moon K.³³⁴ Usually, though, a simple phone call is enough to take care of the problem.³³⁵ In the face of an unauthorized usage, the KSAs will notify the kashrus publications.³³⁶ In addition, when the result of the unauthorized usage is that a nonkosher product is mislabeled, the KSAs may insist that offenders publicize unauthorized usages in commonly read Jewish publications and recall mislabeled products.³³⁷

One explanation for the lack of private litigation is that its costs may outweigh any benefits, especially for smaller, local KSAs that only certify a handful of clients who market food nationally.³³⁸ Some KSAs express concern only if the kashrus standards of the KSA with the confusing alternate mark are not acceptable to them.³³⁹

Yet another explanation for the lack of activity that applies to both KSAs and kosher consumers who are observant Jews is a religious law that prohibits Jewish parties from suing one another in secular court.³⁴⁰ The Beit Din (rabbinical court) would be the appropriate forum for resolving these disputes.³⁴¹ Yet, there is no evidence that KSAs or consumers go to the Beit Din to arbitrate these types of claims either.³⁴²

332. *Id.*

333. *Id.* This is so despite the facts that a number of KSA trademarks appear to be very similar. For example, there are several variations of a *Square K*. One might think that some trademark similarity is inevitable to the extent that KSAs wish to employ the letter K and some basic shape or religious object in an easily printed insignia.

334. *Levy v. Kosher Overseers Ass'n of Am., Inc.*, 104 F.3d 38 (2d Cir. 1997) (granting the OK the injunction it sought, but awarding no damages). Compare the half moon K (if encircled) with the OK mark:  versus . *Who's Who*, Nov. 1993, *supra* note 77, at 30, 33.

335. Interviews with various KSA representatives (Fall 2002) (for interview clarification see *supra* note 5).

336. *Id.*

337. *Id.*

338. These KSAs would have to demonstrate that the alternate mark has created confusion within the geographic scope of their own mark. See *Levy*, 104 F.3d at 41-42.

339. Interviews with various KSA representatives (Fall 2002) (for interview clarification see *supra* note 5).

340. See Ira Yitzchak Kasdan, *A Proposal for P'Sharah: A Jewish Mediation/Arbitration Service*, JEWISH ACTION, Spring 1990, at 22, 22-26 (discussing the prohibition and presenting alternatives to the rabbinical courts), available at <http://www.jlaw.com/Articles/psharah1.html> (last visited Nov. 3, 2003).

341. *Id.* at 22.

342. See generally *id.* (suggesting some reasons parties might reject rabbinical courts). It is possible that jurisdictional limitations on rabbinical courts undercut their appeal. See *id.* at 23.

(c) *Tier Three Enforcement: Consumer Protection Laws*i. *The Shelat Example*

Over the past twenty years, the kosher food industry has not faced crisis upon crisis of large-scale instances of fraud or mistake. Instead, there have been only a handful of controversies that have caught the attention of industry insiders and consumers alike. The cases are few and far between.

The biggest fraud case, however, was the suit brought by the State of Illinois against three Chicago corporations: Shelat Kosher Foods, Inc., United Poultry, Inc., and Aspen Foods, Inc.³⁴³ As described above, the kosher food industry exploded in the 1980s. One company taking part in this expansion was Shelat, one of the nation's biggest suppliers of kosher chicken.³⁴⁴ Fittingly, Shelat kosher chicken was supervised and certified by the OU, the biggest KSA in the world.³⁴⁵

In late 1987, a Jewish employee of United Poultry Inc., sister company of Shelat Kosher Foods Inc., came forward to the OU with the tip that at night, when the KSA supervisor left the plant, the company would package nonkosher food items to be sold as kosher.³⁴⁶ A surprise inspection by the OU verified the accuracy of the whistle-blower's statement.³⁴⁷ The information broke at the time that the Chicago Rabbinical Council (CRC), a dominant KSA in Illinois and much of the Midwest, was installing the new head of its Rabbinical Court.³⁴⁸ The event featured many esteemed leaders of the Jewish community, presenting a cast of who's who in kosher supervision and certification.³⁴⁹ The manner and speed with which the news of the Shelat fraud spread provides a prime example of how much the monitoring, reporting, and sanctioning of kosher fraud relies upon participation in social and religious activities within the Orthodox Jewish community.

The Shelat scandal presented the worst instance of fraud perpetrated against the kosher food industry.³⁵⁰ Kosher consumers in as many as twenty-two states were affected by the fraud.³⁵¹ One Rabbi oversee-

343. See Mary Ann Galante, *Suit Says Shelat Falsely Labeled Foods Kosher*, L.A. TIMES, Nov. 6, 1987, at B4, available at 1987 WL 2252467.

344. *Id.*

345. *Id.*

346. See *id.*; William C. Hidlay, *Companies Accused in Kosher Fraud Agree to Settlement*, ASSOCIATED PRESS, Feb. 26, 1988, available at 1988 WL 3770784.

347. Hidlay, *supra* note 346.

348. Interview with prosecuting attorney in the case (Fall 2002) (for interview clarification see *supra* note 5). The CRC Rabbinical Court, or Beit Din, mediates and arbitrates civil disputes, issues religious divorces, and oversees religious conversions. Its KSA symbol is depicted *supra* note 95.

349. Interview with prosecuting attorney in the case (Fall 2002) (for interview clarification see *supra* note 5).

350. Galante, *supra* note 343.

351. Hidlay, *supra* note 346.

ing kashrus for the OU on the West Coast explained, “[s]omething of this magnitude has never happened before in certification history.”³⁵² The fact that one company could willfully defraud the OU and, accordingly, so many kosher consumers, sent waves through the kosher community.

Illinois Assistant Attorney General Rabbi James Gordon was another individual present at the time of the installation when the Shelat story broke.³⁵³ The informant employee agreed to give a detailed affidavit to the Illinois Attorney General’s office, explaining the nature and extent of the fraud, and the case was referred to the Consumer Fraud Division.³⁵⁴

The State of Illinois enacted a kosher fraud statute entitled the “Kosher Food Act.”³⁵⁵ The Illinois Kosher Food Act provides that anyone who acting “with intent to defraud . . . falsely represents any food product” to be kosher is guilty of a Class C misdemeanor.³⁵⁶ A Class C misdemeanor is punishable with a fine of \$1500; Class A is the greater of \$2500 or the amount of the offense.³⁵⁷ Class C is punishable with up to thirty days in prison; Class A is less than a year.³⁵⁸

Despite the presence of the specialized kosher fraud statute, the chief of the Consumer Protection Division, William Sullivan, declined to use it for the basis of prosecution in the Shelat case.³⁵⁹ Instead, on November 4, 1987, the case was brought under the Illinois Consumer Fraud and Deceptive Business Act,³⁶⁰ a general consumer protection statute, and the State sought a permanent injunction against Shelat as well as a large fine.³⁶¹ The Attorney General’s office estimated that Shelat made about \$250,000 in profits from its fraud.³⁶²

Sullivan explained his selection of the Fraud and Deceptive Business Act and rejection of the kosher fraud statute on the grounds that: (1) he doubted the constitutionality of the kosher fraud law, and did not want to lose an easy case on constitutional grounds or expend vast resources litigating what *kosher* meant, and (2) Illinois general consumer protection remedies were liberal.³⁶³

352. Galante, *supra* note 343.

353. Interview with an attorney present at Attorney General’s office (Fall 2002) (for interview clarification see *supra* note 5).

354. *Id.*

355. 410 ILL. COMP. STAT. ANN. 645/1 (West 2003).

356. *Id.*

357. 730 ILL. COMP. STAT. ANN. 5/5-9-1 (West 2003).

358. *Id.* at 5/5-8-3.

359. Interview with an attorney present at Attorney General’s office (Fall 2002) (for interview clarification see *supra* note 5).

360. *Id.*; 815 ILL. COMP. STAT. ANN. 505/2 (West 2003).

361. See Hidlay, *supra* note 346.

362. *Id.*

363. Interview with an attorney present at Attorney General’s office (Fall 2002) (for interview clarification see *supra* note 5).

This raises two salient points about the enforcement value of the kosher fraud statutes. First, it suggests that even if kosher fraud statutes offer unique enforcement monitoring or sanctioning schemes, any effort to calculate the cost of implementation would have to include the uncertain cost of future litigation concerning the statutes' constitutionality. And second, it demonstrates that not only do general consumer protection statutes punish the same behavior that kosher fraud statutes capture, but in many cases, they may offer clearly superior remedies for the violation.

On November 5, the Cook County Circuit Court ordered a nationwide recall of approximately 350,000 pounds of meat and poultry and issued a temporary injunction shutting down the Shelat plant that processed kosher poultry.³⁶⁴ Three weeks later, Shelat entered into a consent decree where it stipulated its fault and agreed not to sell kosher food products in the future.³⁶⁵ Its officers were fined \$236,000 to \$250,000 in restitution paid to the OU and \$14,000 in civil penalties.³⁶⁶ Though consumers were directed to the retailers from whom they purchased Shelat products, none of the court award went to consumers or consumer groups.³⁶⁷

The effects of the Shelat scandal on the kosher food industry are hard to measure. Though industry participants worried about consumer confidence,³⁶⁸ the kosher market, in the aftermath of Shelat, suffered no noticeable dip.³⁶⁹ The main lesson the kosher food industry learned from Shelat was that there were some gaps in the KSA supervision process that needed to be filled to prevent future fraud, but in the face of a willful tortfeasor, everyone was vulnerable. After Shelat, the KSAs tightened their internal monitoring of their clients.³⁷⁰ Given the general expansion of the kosher food industry and the dominant presence of the OU, it is not clear that the OU suffered any lingering affects from having been victimized by its own client. A smaller, less well-known KSA could have been harmed if it had been hired by Shelat. Due to its good reputation through the kosher food industry, consumers could easily view the OU as a co-victim of the fraud, rather than blaming the OU for what happened.

364. Hidlay, *supra* note 346.

365. *Id.*

366. *Bogus Kosher Food Firm Ordered Closed*, CHI. SUN-TIMES, Nov. 25, 1987, at 18, available at 1987 WL 4122141 [hereinafter *Bogus Kosher*].

367. Interview with a consumer watchdog (Fall 2002) (for interview clarification see *supra* note 5); see also *Bogus Kosher*, *supra* note 366.

368. Herrmann, *supra* note 206 (explaining that Jews who kept kosher were in "an absolute panic" and as a result had a wariness of all things marked kosher).

369. Interviews with consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

370. Interviews with various KSA representatives and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

Though the events described above occurred fifteen years ago, the name Shelat is still synonymous with fraud in the kosher food industry. When asked about the problem of kosher fraud, some industry insiders and leaders in the Jewish community immediately will talk about Shelat as a frame of reference.³⁷¹ Despite significant market growth since then, there still has not been another instance of fraud discovered like Shelat.

ii. Kosher Fraud Statute Enforcement

While many states have kosher fraud statutes, kosher fraud enforcement is not uniform throughout the United States. No one has systematically collected enforcement data from all states with kosher fraud statutes in thirty years. Despite the dramatic changes in the kosher food industry since then, some of the findings from 1972 still hold true today. Most important is the fact that state enforcement is limited to a handful of jurisdictions that feature the largest Jewish communities, such as New York, New Jersey, and Baltimore, Maryland—precisely the same regions that produced the cases declaring the laws unconstitutional.³⁷² Thus, the majority of kosher fraud statutes are empty shells—legislative sentiments with no accompanying monetary commitment expressed in favor of a community that may or may not exist in 2003. Only a few loci of Jewish communal life present any evidence of the effectiveness of active kosher fraud enforcement or the lack thereof. This Section will briefly detail the prior research findings about kosher fraud enforcement, and then demonstrate how much the landscape has changed.

1) Thirty Years Ago

In 1972, Professor Daniel Elazar, a political scientist, and Professor Stephen Goldstein, a lawyer, wrote an article detailing whether American Jews have a distinctive legal status as a community.³⁷³ Recognizing that “[k]ashrut enforcement represents one of the most methodical systems of linkage between government and the Jewish community in the United States,”³⁷⁴ Elazar and Goldstein sent a questionnaire to the officials responsible for enforcing kosher fraud statutes in the eighteen states that had such laws soliciting information about them, including

371. Interviews with various KSA representatives, consumers, and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

372. Interview with a consumer watchdog (Fall 2002) (for interview clarification see *supra* note 5).

373. Daniel J. Elazar & Stephen R. Goldstein, *The Legal Status of the American Jewish Community*, in 73 AMERICAN JEWISH YEAR BOOK 1972, at 3, 3-94 (Morris Fine & Milton Himmelfarb eds., 1972).

374. *Id.* at 35.

how often the statute was invoked and the annual expenditure on kosher fraud enforcement.³⁷⁵

Using the results of the surveys combined with “documentary sources,”³⁷⁶ Elazar and Goldstein found that only New York and California reported “significant numbers of prosecutions” and that most states reported “little or no prosecution.”³⁷⁷ In order to understand what *significant numbers* mean, the article identified that New York reported a monthly average of six civil penalties for violations³⁷⁸ or, in other words, seventy-two prosecutions culminating in penalties each year.

In 1957 and 1958, the California legislature appropriated \$20,000 for kosher food law enforcement, representing the only case of any specific legislative appropriation for kosher fraud enforcement.³⁷⁹ In addition, an Orthodox Rabbi was hired to work for the California Department of Public Health (DPH) as a kosher-food law representative from 1957 until 1965, when the post was eliminated.³⁸⁰ The chief of the DPH Bureau of Food and Drugs explained that part of the reason for the move away from kosher fraud enforcement was the “divergence of opinion” within the Jewish community about what kosher meant.³⁸¹

In the face of this evidence, Elazar and Goldstein were hesitant to criticize the effectiveness of the kosher fraud statutes. They theorized that the mere existence of the statutes and threat of investigation or prosecution could act as a deterrent.³⁸² In fact, though they offered no evidence to substantiate this theory, they asserted in their conclusion that “kashrut-enforcement laws protect individual consumers from fraud.”³⁸³

2) Today

Over the past thirty years, the kosher food industry has exploded. Yet the kosher fraud statute enforcement continues to be a local phenomenon specific to the large Jewish communities in the New York/New Jersey metro area, Baltimore, and southern Florida.³⁸⁴ After

375. *Id.* at 37 n.15.

376. *Id.*

377. *Id.* at 38.

378. *Id.*

379. *Id.* at 39.

380. *Id.*

381. *Id.* at 40.

382. *Id.* at 38.

383. *Id.* at 52.

384. Interviews with various KSA representatives and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5). There are some reports that some KSAs in locations with unenforced kosher fraud statutes inform parties of the existence of the laws hoping it will deter bad behavior. See Elizabeth Lee, *Ruling on Kosher Label May Affect Laws in Georgia*, ATLANTA J.-CONST., Feb. 25, 2003, at E4 (director of the Atlanta Kashruth

courts struck down the kosher fraud statutes, those jurisdictions have been forced to reformulate their statutes and are copying the current New Jersey disclosure model.³⁸⁵ As a result, the only current data about kosher fraud statute enforcement comes from New York.

The following data comes from the New York State Department of Agriculture and Markets Annual Report:³⁸⁶

Year	Complaints	Investigations	Inspections	Violations
1998	46	392	8401	105
1999	63	418	7277	103
2000	61	309	7441	84
2001	61	342	8173	97

As the data show, while the number of investigations rose, the number of inspections (or visits) declined. In fact, though the number of inspections started to climb after 1999, it still did not hit the level of inspections in 1998. The 2000 and 2001 reports attribute a decrease in violations to an increase in enforcement efforts;³⁸⁷ this explanation is questionable given the 1998 data. If the increased enforcement in 2000 and 2001 deterred bad conduct, producing fewer violations, why did the 1998 level of activity not produce a similar result? There is no evidence that the types of inspections and investigations were less thorough or skilled in 1998; if anything, the looming *Commack* litigation may have undermined the kosher enforcement bureau's authority.³⁸⁸

Even more importantly, the raw data does not explain the nature of the penalties (for example, amount of fine, possibility of jail time) issued for each violation. The number of violations is an imperfect proxy used to measure the enforcement. Because the violation at issue in *Commack* was a fourth offense, the Department of Agriculture fined Commack \$11,100.³⁸⁹ But this is an unusually high fine. About eighty of the violations in 2001 carried fines of only \$300.³⁹⁰ Commack incurred fines of \$600 and \$300 for its prior offenses.³⁹¹ The harm from the Commack fine is attributed not to the amount of money, but rather

Commission stating that "the laws serve as leverage in persuading restaurants to stop referring to themselves as kosher when they are not").

385. Interview with consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

386. N.Y. ST. DEPT AGRIC. & MARKETS ANN. REP. (1998-2001), available at <http://www.agmkt.state.ny.us/annualreport.html> (last visited Dec. 9, 2003).

387. *Id.*

388. The district court issued its opinion declaring the New York kosher fraud statute unconstitutional in July 2000, *Commack Self-Serv. Kosher Meats, Inc. v. Rubin*, 106 F. Supp. 2d 445, 459 (E.D.N.Y. 2000), but it was stayed pending the resolution of the case on appeal.

389. Katherine Marsh, *Dispatch: Busting Chops*, LEGAL AFF., Sept.-Oct. 2002, at 59-60.

390. *Id.* at 62.

391. See *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 419-20 (2d Cir. 2002).

to consumer reaction to the fine being reported in *KASHRUS MAGAZINE* and the *Jewish Press* due to the fact that “an allegation that a purportedly kosher facility acted in contravention of the laws governing *kashruth* is a reflection upon the integrity and reliability of the proprietors of the purportedly kosher facility.”³⁹²

As a result, it seems that the bureau’s declaration about the effects of its enforcement efforts is mostly wishful thinking. From the data offered, it is impossible to offer any explanation about the relationship between the existence of kosher fraud and the number of kosher fraud investigations, inspections, or violations.

While no one can claim to know the exact amount of kosher fraud, when asked about the amount of fraud overall, industry participants approximated that since Shelat, the total amount of fraud has increased; however, in real terms, these individuals felt that fraud either had remained constant or actually decreased.³⁹³ That is to say, fraud has not been growing at the same rate that the kosher food industry has expanded. A comparison of the 1972 data with the 1998-2001 data, as incomplete as the data is, loosely substantiates this observation.³⁹⁴ In 1972, the number of penalties issued in New York was roughly seventy-five percent of the total number of violations issued thirty years later.³⁹⁵ At the same time, the kosher food industry has grown far beyond that.

When asked to explain this change in the rate of fraud, industry insiders will point to the stricter supervision from KSAs, the increasing level of sophistication in consumers, and the easier means of spreading information (internet, cell phones, and the like).³⁹⁶ None cite changes in kosher fraud laws or their enforcement. There is no other evidence suggesting that kosher fraud statute enforcement is responsible for this change.

According to some industry insiders, the kosher fraud enforcement is of limited value, because offenders simply view the penalties as “the cost of doing business” and repeat instances abound.³⁹⁷ Thus, the problem with kosher fraud prosecution might be that the fines and penal-

392. *Commack Self-Serv. Kosher Meats, Inc. v. Rubin*, 170 F.R.D. 93, 97 n.7 (E.D.N.Y. 1996). Brian Yarmeisch, one of the owners of the Commack business, explained the shift away from the kosher meat market in the wake of the state penalties as follows: “I had customers come in crying to me that their trust was broken by what they had read.” Marsh, *supra* note 389, at 60.

393. Interviews with various KSA representatives and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

394. See *supra* Section IV.B.1.(c).ii.1.; see also chart *supra* Section IV.B.1.(c).ii.2.

395. See *supra* Section IV.B.1.(c).ii.1.

396. Interviews with various KSA representatives, consumers, and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

397. Interview with a KSA representative (Fall 2002) (for interview clarification see *supra* note 5).

ties are not sufficiently high to deter fraudulent behavior, not that they have no effect.³⁹⁸ Given the strong reputation harms, one might wonder how a food manufacturer or retailer even gets a chance to be a repeat offender. After all, would not the state action trigger an adverse reaction within the networked community of kosher consumers?

Three factors prevent state sanctions from automatically translating into reputation harms. First, the specter of libel looms. *KASHRUS MAGAZINE* formerly published the state violation listings, such as in *Commack*, but encountered problems when the state would clear a business after the fact and the magazine had already printed the information.³⁹⁹ As a result, the magazine stopped reporting state violations.⁴⁰⁰ Next, many of the parties fined or penalized by the kosher enforcement never were considered merchants of kosher food as required by mainstream Orthodox standards.⁴⁰¹ This is clearly true in the *Barghout*⁴⁰² and *Commack* cases. Absent the usage of the term *kosher*, neither case presented an instance of a vendor misrepresenting his behavior or private certification status to consumers. Lastly, kosher consumers and industry participants are somewhat suspicious that the state kosher enforcement can act more to harass business owners than protect consumers. This circumstance was likely present in the *Commack* case as well.⁴⁰³

Some kosher fraud prosecution is a direct result of private efforts to discover fraud. It is unclear how much of the state action results in new reports of fraud and how much it relies on tips from private consumers anyway. Other weaknesses of the kosher fraud enforcement called into question were investigative “surprise” visits scheduled “next Tuesday.”⁴⁰⁴

398. Attorney Nathan Lewin, who represented a group of *Commack* intervenors in favor of the kosher fraud laws, has stated that a silver lining of the decision is that “it ‘gives New York an opportunity to replace the old law with a 21st century law’ which can ‘provide even tougher remedies against vendors who deceive kosher consumers.’” See Emmer, *supra* note 281.

399. Response to telephone inquiry to Rabbi Yosef Wikler, *KASHRUS MAGAZINE* editor (Oct. 2002).

400. *Id.*

401. Interview with a KSA representative (Fall 2002) (for interview clarification see *supra* note 5).

402. *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337 (4th Cir. 1995).

403. In the late 1980s, Hebrew National brought a claim under 42 U.S.C. § 1983 against Rabbi Rubin, the director of the New York Kosher Law Enforcement Division, alleging that Rubin “intentionally fabricat[ed] baseless charges” against Hebrew National. *Nat’l Foods, Inc. v. Rubin*, 727 F. Supp. 104, 109 (S.D.N.Y. 1989). “The Attorney General refused to bring an enforcement proceeding against Hebrew National,” stating that “the Kosher Law Enforcement Division had failed to conduct even the most rudimentary investigation.” *Id.* at 107 (finding that no § 1983 suit could lie against Rubin for harms to “reputation alone”).

404. Interview with a KSA representative (Fall 2002) (for interview clarification see *supra* note 5).

Among various issues of concern to industry participants, though, willful fraud is not a particularly large concern, and they often view the kosher fraud statute as anachronistic. One consumer watchdog expressly stated that the kosher fraud statute has “outlived its day.”⁴⁰⁵ At the same time, nearly all would defend the law.⁴⁰⁶ While the attachment might be attributable to the belief that the law has some utility, the clear argument in favor of the statute is an expressive one: the kosher fraud statute legitimates Jewish Orthodox standards of kashrus in the fight for who controls the standards of kashrus and acts to exclude competing interpretations.⁴⁰⁷ In this light, one could hardly argue with the viewpoint that the constitutional problem with state kosher fraud enforcement is that it is a state choice of one definition of kosher over alternatives. If anything, it demonstrates the accuracy of the determinations by the California Department of Health⁴⁰⁸ and various courts⁴⁰⁹ that the kosher fraud statute is about selecting one orthodoxy over another.

In conclusion, the kosher fraud statute enforcement does contribute in discovering and sanctioning willful fraud within the market for prepared kosher food. However, it is not likely that the threat of investigation and penalty under these statutes significantly deters willful fraud more effectively than the threat of private sanction or prosecution under general consumer protection laws.

2. Other Market Observations

While this Article tackles the issue of how multitiered enforcement efforts to combat kosher fraud interact, industry insiders place kosher fraud fairly low on their lists of significant concerns and issues facing

405. Interview with a consumer watchdog (Fall 2002) (for interview clarification see *supra* note 5).

406. Parties who sought to intervene in *Commack* in defense of the law included the following major Orthodox organizations: the OU, Rabbinical Council of America (RCA), Agudath Israel of America, National Council of Young Israel, Rabbinical Alliance of America, Agudath Harbonim of the United States and Canada, and Torah Umesorah-National Society of Hebrew Day Schools. *Commack Self-Serv. Kosher Meats, Inc. v. Rubin*, 170 F.R.D. 93, 102 (E.D.N.Y. 1996). In addition, various individuals sought to intervene, including: (1) several kosher consumers, (2) a competing kosher business in Plainview, New York, and (3) an Orthodox rabbi in a neighboring town. *Id.* at 101-02.

407. See generally Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 615-17 (1998); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593-601 (1996) (describing punishment as a form of expressive condemnation); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 946-47 (1995) (government actions as prescribing orthodoxy); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 923 (1996).

408. Elazar & Goldstein, *supra* note 373, at 39-40.

409. See *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 425 (2d Cir. 2002); *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1346 (4th Cir. 1995).

the kosher food industry today.⁴¹⁰ More important to them, for example, are mistakes, the rapid proliferation of KSA marks, and international fraud/theft of intellectual property.⁴¹¹ In addition, it appears that an entire class of kosher consumers, namely those who are not observant Jews, is excluded from consideration within the existing enforcement regimes. Studies aimed at aiding all kosher consumers today, thus, would have to examine these other areas of concern, along with fraud, before offering a general proposal.

(a) *Role of Mistake*

According to the industry participants interviewed, the majority of food erroneously being sold as kosher is likely a result of mistakes by various parties (the KSA, the manufacturer, and so on) or unintended unauthorized usages of kosher symbols.⁴¹² A significant concern is how to best limit the instances of mistake and how to limit the complications that arise when attempting to correct for mistakes.⁴¹³

There are several ways that these mistakes can happen. A high percentage of the mistakes reported represent instances where a KSA made an error in how it certified a product or product line (for instance, an erroneous declaration of pareve) or there was some miscommunication between the client and KSA about necessary steps to ensure the kashrus of a product. Mistakes are more common when kosher and nonkosher foods are labeled at the same plant. For example, labels for octopi, which are invertebrates, and thus not kosher, were switched with labels for tuna, which is a kosher fish.⁴¹⁴ The error was fairly obvious to consumers who opened the wrongly labeled cans. For some other food products, mistakes are less visible.

The classic unintended, unauthorized usage occurs when an internal company product label happens to be the same as a trademarked KSA symbol. For example, some of the KSA symbols feature letters within a circle, such as an encircled U, K, or V.⁴¹⁵ When one company used alphabet codes of a letter within a circle to label products for internal usage and then sold the food without having removed these labels, some inevitably contained a KSA trademark.⁴¹⁶ OK Laboratories relies on its trademark of a circle around a K;⁴¹⁷ this can lead to confu-

410. Interviews with various KSA representatives and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

411. *Id.*

412. Interviews with various KSA representatives and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

413. *Id.*

414. *Id.*

415. *Who's Who, Nov. 1993, supra* note 77, at 30-31.

416. Interview with a KSA representative (Fall 2002) (for interview clarification see *supra* note 5).

417. *Who's Who, Nov. 1993, supra* note 77, at 30.

sion about the food sold at Circle K, a supermarket chain found in the South and West.

Mistakes are just as important to consumers as instances of actual fraud—the harm is nearly identical. In fact, one area worth exploring is whether the sale of nonkosher food as though it were kosher should be a strict liability offense akin to the sale of a defective or unsafe product. Because the harm caused by mistake is almost the same as the harm caused by negligent, reckless, or willful fraud, perhaps strict liability is appropriate. Under classic theory, strict liability is appropriate when preventing harm is essentially within the purview of the defendant. Tort law treats defective product design differently from general consumer fraud because of the fear that strict liability would create a moral hazard. Given the vigilance of the kosher consumer and the inevitability of (and forgiveness issued toward) mistake, strict liability in the kosher fraud context might seem problematic as well.

(b) *Too Many Marks*

When asked to identify the biggest problem facing kosher consumers today, not one industry insider offered fraud itself or the attack on kosher fraud laws as an answer.⁴¹⁸ The main issue most frequently identified was the proliferation of certification symbols, especially non-mainstream ones that consumers were not likely to recognize.⁴¹⁹ In particular, there was concern regarding the degree of similarity that was occurring, and inevitably would, given hundreds of certification symbols. Furthermore, many of the newer certifiers lacked adherence to Orthodox standards of kashrus, so confusion between the marks could lead to mistaken consumption of food that Orthodox authorities would not deem to be kosher.⁴²⁰

One commentator, critical of the kosher fraud statute, noted that if his preschool-aged niece knew how to look for the symbol of the OU to know if something is kosher or not, then the average adult could rely on KSAs without the need for state intervention.⁴²¹ Yet there are hundreds of KSAs certifying food as kosher. The question is not whether a preschooler or adult could recognize the OU mark; rather, when presented with alternative marks, like the Scroll K, Sefer Torah K, Tablet K, or Casebook K, could the consumer accurately identify the KSA certifying the product?

418. Interviews with various KSA representatives, consumers, and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

419. *Id.*

420. *Id.*

421. Jacob Sullum, *Kosher Cops*, in IDEAS ON LIBERTY (Foundation for Economic Education), July 1993 (arguing that kosher fraud laws are a form of subsidy for kosher consumers that warrants a second look), available at <http://www.fee.org/vnews.php?nid=2759> (last visited Oct. 18, 2003).

One consumer relayed a story that demonstrates the effects of having too many marks. She needed to buy flour and was choosing between Gold Medal, which is certified by the OU, and Robin Hood, which is certified by the COR.⁴²² This consumer explained that she had no brand preference, and the Robin Hood flour was a few cents cheaper.⁴²³ She could not recall whether the COR certification was acceptable.⁴²⁴ Ordinarily, she would use a cell phone and call a rabbi she trusted to ask about the mark in question; however, she did not have the phone with her that day.⁴²⁵ As a result, she bought the OU certified product and spent the extra few cents on piece of mind.⁴²⁶

It is not clear that the proliferation of KSAs and marks is as bad as industry participants make them out to be. After all, an actively functioning subindustry market would limit unacceptable KSAs through two mechanisms. First, vertical integration would act to suppress the expansion of business by KSAs not accepted by mainstream Orthodox KSAs. Second, sophisticated and involved observant kosher consumers would reject the unacceptable KSAs. Within the Orthodox world, for example, there is a controversy over the acceptability of the marks used by the Triangle K and Half Moon K, two KSAs that purport to use Orthodox standards for supervision and certification.⁴²⁷ The general knowledge about this and other like controversies, even if consumers heuristically can only accept the binary reliable/not reliable shorthand rather than appreciate the shades of gray of kashrus implicated, suggests that sophisticated kosher consumers cannot be fooled and that many other consumers simply do not care. In addition, if a new KSA trademark is so similar to an existing one as to create confusion, the KSA whose mark is being infringed is free to sue.⁴²⁸

While most of the concern about the proliferation of marks is merely the fight over who controls the definition of kosher, the concern about the likelihood of confusion is not entirely misplaced. As explained above, when there are too many trademarks to recognize the marks,

422. To view this Canadian mark, see *supra* note 96 and accompanying text.

423. Interview with a consumer (Fall 2002) (for interview clarification see *supra* note 5).

424. *Id.*

425. *Id.*

426. *Id.*

427. The administrator of KOA, which issues the Half Moon K, is a respected Orthodox rabbi who contracts out to many supervisors. Anshe Sholom B'Nai Israel Congregation, *Kashrut Clarifications*, at <http://www.asbi.org/koshletter11-02correct.html> (last modified Dec. 4, 2002). Standards among supervisors vary so much at this point that the entire mark is suspect. Some kosher consumers will rely on a Half Moon K when the particular supervisor is known and accepted. *Id.*

428. The OK did just this in the KOA case. See *generally* Donel Corp. v. Kosher Overseers Ass'n of Am., Inc., No. 92 Civ. 8377, 2001 WL 228364 (S.D.N.Y. Mar. 8, 2001) (permanently enjoining the KOA from using the letter K inside of a circle).

they become useless to consumers.⁴²⁹ Somewhat like broadcasting frequencies, too many marks creates noise. In the face of so much certification noise, then, consumers are reduced to the handful they do know. Yet this problem seems to have a self-correcting solution to the extent that consumers are informed about the standards a given KSA uses or at least informed by a trusted authority which KSAs are acceptable. Consumers who care about stringent standards will gravitate to a handful of big certifying KSAs. If most consumers felt this way, then the number of KSAs would decrease in response. If not, then the proliferation of KSAs represents an emerging need among various kosher consumers for divergent standards in kashrus supervision and certification. Because this market cure depends on kosher consumers and the rabbinical authorities, they rely upon having access to the standards used by KSAs. Then, proposals aimed at solving the legitimate problems proliferation creates for kosher consumers might want to involve forcing disclosure when the market fails to do so.

(c) *International Fraud or Theft of Intellectual Property*

One KSA representative identified international fraud as an increasing problem within the kosher food industry.⁴³⁰ The current system of kosher certification depends on the existence of strong protection for intellectual property rights. The difficulties parallel threats to intellectual property rights in general that have been found overseas.⁴³¹

In particular, some Chinese manufacturing plants were found to have transferred or copied kosher certificates from one plant to another without the knowledge of the original certifying KSA and presented them to KSAs of vertically integrated products.⁴³² The KSA that raised this issue has become an advocate for KSAs to incorporate technologi-

429. For an argument that trademark cases dealing with confusion over KSA marks ought to be determined based on a marketplace study of the sophistication of the consumers, see Jack Achiezer Guggenheim, *KOA Is A.O.K.: The Second Circuit's Recent Kosher Trademark Decision Further Illustrates That the Patent and Trademark Office Must Answer to a Higher Authority*, 22 COLUM.-VLA J.L. & ARTS 203, 212-15 (1998).

430. Interview with a KSA representative (Fall 2002) (for interview clarification see *supra* note 5).

431. See generally Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1125, 1197 (1994); WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 118 (1995); Glenn R. Butterton, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081 (1996); Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT'L L.J. 1 (2001); Peter K. Yu, *Toward A Nonzero-Sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists*, 70 U. CIN. L. REV. 569 (2002).

432. Interview with a KSA representative (Fall 2002) (for interview clarification see *supra* note 5).

cal aspects such as counterfeitproof seals and bar codes into its certificates to prevent this type of fraud.⁴³³

(d) *Left-Out Consumers*

As explained above, the market of kosher consumers consists of various groups who keep kosher for different reasons. Nonetheless, it is only one group, the observant Jewish consumers, that engages in vigorous private monitoring and information sharing. The other kosher consumers free ride off the efforts of these other consumers; they benefit from the presence of other actors within the vibrant kosher food industry, but lack the network connection to the information distribution chain.

KSAs and kosher consumer watchdog groups are aware of the existence of these proxy users and regularly cite to the general statistics about the size and growth of the kosher food industry, which aggregates all kosher consumers.⁴³⁴ Likewise, the litigants and scholars addressing the constitutionality of the kosher fraud statute refer to proxy usage of kosher as a justification of a secular purpose for the law.⁴³⁵ But while the kosher fraud enforcement might aim to protect this proxy usage, the KSAs and consumer watchdogs do not consider these consumers as their intended audience. Professor Joe Regenstein, a food scientist who serves as head of the Cornell Kosher Food Initiative, has proposed that kashrus supervisors and certifiers could also specifically investigate and certify for the benefit of proxy users with little added cost.⁴³⁶ This suggestion has not been well received within the KSA world.⁴³⁷

Any proposal directed towards curing kosher fraud or otherwise protecting kosher consumers needs to be honest about protecting these left-out consumers. While ideally they might be best off creating their own private market certification systems, this might not be practical for various reasons.⁴³⁸ Until such a time, it is important to balance the

433. *Id.*

434. *See Scope and Size, supra* note 167.

435. *See Ran-Dav's County Kosher, Inc. v. State*, 608 A.2d 1353, 1364 (N.J. 1992) ("We remain unpersuaded by the repeated contention that the laws of kashrut have become secular norms."); *ACLU Fights Florida Program with Outdated Notion of Kosher*, KOSHER TODAY, Sept. 1999, at 1, 14 ("One national Orthodox Jewish organization, Agudath Israel of America, is strongly advocating a national law to promote protection for kosher consumers Although such a law would no doubt benefit Orthodox Jews, it would also protect the millions of Americans who buy kosher for . . . reasons that are unrelated to religion."), available at <http://www.kosherstoday.com/kosher%20today%20archives/1999/0999/all%20text.htm> (last visited Feb. 7, 2004).

436. Telephone interview with Professor Joe Regenstein, head of Cornell Kosher Food Initiative (Sept. 9, 2002).

437. *Id.*

438. Reasons include the start-up costs involved, the lack of a cohesive core group with connections linking one to the other, and other difficulties.

vulnerabilities of these consumers with a recognition of the incentives for these parties to take action to protect themselves.

C. *A Proposal for Kosher Fraud*

Even though they capture some instances of fraudulent behavior, kosher fraud statutes are not particularly efficient at solving the problems that kosher consumers face in 2003. Therefore, efforts to revive the kosher fraud laws simply by curing the constitutional defect are misplaced.⁴³⁹ At the same time, an inappropriate legal response would be to eliminate any form of specialized consumer protection for these consumers.

Simply discarding the statutes without a substitute solution is problematic for two reasons. First, it ignores the fact that these statutes are a subsidy that these consumers have gained in the political process, albeit one that has been lost in the judicial process. The resource allocation, regardless of form,⁴⁴⁰ is almost a given. While this Article does suggest that this form of subsidy is imperfect, that does not mean that there is not a substantial window where state action could help the consumers in question.⁴⁴¹

Second and more important, eliminating kosher fraud statutes without shifting the resources to aid kosher consumers would be imprudent, because it penalizes those private actors who aim to establish mechanisms that would help themselves. If the solution in cases like the kosher fraud example were that no particularized state assistance should be available, it would create the perverse incentive for inaction by those parties closest to and most able to discover the harm. At that point, the equilibrium could tip and trigger a situation where the consumers change their behavior such that they actually will require additional state resources to monitor and sanction, and that this *need* could be grounded in general theories of civil enforcement (tort and crime) about providing social welfare where private markets have failed. Accordingly, even to those who might object to consumer protection laws that are merely rent-seeking subsidies for various consumer groups, it might be appropriate to acknowledge and accept rent-seeking behavior from these groups if the absence of such laws would induce the type of

439. See *Pataki Legislation Would Govern Labeling of Kosher Foods*, THE RECORD (Bergen County, N.J.), Feb. 27, 2003, at A05 (reporting how Governor Pataki “acknowledged that little about the food labeled kosher would change and that the new legislation is designed specifically to meet constitutional objections”).

440. This does not mean to imply that it would have been equally easy for the parties to obtain through the political process any form of subsidy that transfers the same amount of resources.

441. The characterization of the kosher fraud statute as a form of rent-seeking is not a normative one.

private ordering that would lead to the development of a more legitimate foundation for such laws.

This raises the important question whether the private ordering of kashrus—the certification intermediaries, the consumer watchdogs, the consumer information-sharing networks, and so forth—depends on the current state of legal affairs. How much would a change in kosher fraud statutes affect private behavior? If it would not change private behavior, then perhaps any form of kosher legislation might simply be rent-seeking subsidization.⁴⁴² While no one can be certain, the evidence suggests that, in the year 2003, the kosher food statute only works in preventing willful fraud to the extent it is integrated within the existing private enforcement system, and that changes in these laws would have little effect on that private regime.

This does not mean to suggest that kosher fraud laws may not have played a foundational role in shaping how the supervision and certification industry developed.⁴⁴³ Merely, once the house of kashrus certification was built, some of the original beams are no longer needed for support. Indeed, it may be the case that many instances of “Order Without Law” should add the addendum “but only after the existence of law at a time prior to private ordering supplanting it.” The relationship between law and private ordering is a dynamic one; more or less law may be an appropriate response within this dialogue.⁴⁴⁴

With these concerns in mind, this Article attempts to offer an alternate proposal of consumer protection legislation that could complement rather than duplicate private efforts because, unlike other private groups that eschew judicial enforcement of contract or tort, many kosher food industry participants and kosher consumers advocate in favor of such laws.⁴⁴⁵ Two particular information-based areas in which the state could assist kosher consumers are: (1) connecting different kosher consumers to the existing private network of information and (2) requiring disclosure of standards when parties seek to use the kosher label. The New Jersey kosher disclosure statute offers an example of this second approach to information-sharing.⁴⁴⁶ Each solution suggests that

442. Scholars employ the term “subsidization” in many different ways and often mean to convey negative connotations. Yet it is possible to imagine that nearly every form of government action is a form of subsidy in that it unavoidably transfers resources back to the populace in a manner that is disproportionate to what the state of affairs would be absent the activity. A full discussion of subsidization (including the legitimacy of various forms of subsidies) is beyond the scope of this Article and best reserved for a future date.

443. The instrumentality of these laws in shaping this private ordering is best left for another time and perhaps another scholar.

444. Inquiries into the potential for and existence of nonlegal regimes ought not to ignore the role of law as precursor to order.

445. Interviews with various KSA representatives, consumers, and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5); see *supra* Section III.C.2.(c).

446. N.J. ADMIN. CODE tit. 13, § 45A-21.1 (2003).

the problems to be cured are particular coordination failures within the private monitoring, sanctioning, and information-sharing systems. This Section explains why a voluntary information bank might be a preferable solution to the kosher fraud problem and why the move towards mandatory disclosure might be misguided.

1. *Networking Opportunities*

While KSAs and kosher consumers have been successful at identifying fraudulent actors within the kosher food industry and ultimately sanctioning these parties, there is still a significant lag in the distribution of information about past violations. Kosher fraud enforcement has this same problem. When fraud (or mistake) is discovered, how fast does news travel to each individual kosher consumer who may have been a victim (or may still experience harm) from the conduct discovered? A small group of vigilant consumers can adequately police the kosher food industry. Their ability to sanction through reputation harms depends on other consumers learning of their discoveries, but there are groups of kosher consumers systematically excluded from this loop. This occurs both because: (1) nontraditional consumers are not linked to the same social and religious networks as observant Jews, and (2) many nontraditional consumers are not linked one to another.

Information dissemination is dependent on key events (the Sabbath, holidays, other special meetings) that revolve around the synagogue and religious life. Information is particularly slow crossing community lines even within the Jewish world, let alone outside of it. In one instance, Orthodox members of the Baltimore Jewish community discovered that some food being sold as “kosher-for-Passover” was not.⁴⁴⁷ This information was slow to cross from the Orthodox community to the non-Orthodox observant community and the nature of the problem was time-sensitive.⁴⁴⁸ There is no evidence that alternative, or proxy-using, kosher consumers regularly receive reports of kosher fraud or mistake, with or without kosher fraud statute enforcement. As it was noted above, KSAs and watchdog groups consider their audience to be traditional Jewish consumers.

Of course, the information is *out* there, in various different places, should nontraditional kosher consumers seek it out. The cost for them, though, is far greater. With the exception of the proxy users who are members of other tight-knit, religious communities, such as Muslims, most nontraditional kosher consumers do not belong to a shared community. Thus, they cannot engage in the same healthy free riding ac-

447. Rona S. Hirsch, *Kosher Cooperation: A Local Kosher Certification Group Promises to Notify Non-Orthodox Leaders When a Kosher Crisis Surfaces*, BALT. JEWISH TIMES, May 1, 1998, at N1, available at 1998 WL 11325864.

448. *Id.*

tivity. In addition, they are not necessarily in a position to judge the credibility of the information they find. While a quick search for *kosher food supervision* on the Internet produces many results, these consumers are less able to separate the wheat from the chaff.

Any state protection seriously aimed at helping kosher consumers would first attempt to solve part of this crossover problem. If kosher fraud protections are fulfilling some general public welfare purpose, then it may be appropriate to focus on the *left-out* consumers. Even if the laws are simply subsidization for the traditional Jewish parties seeking them, perhaps these parties should be held accountable to the larger base of kosher consumers. This obligation may follow from the fact that they justify the need for such laws with arguments about protecting unaware consumers or empirical data that aggregates these consumers into the whole.

Beyond the crossover issue, even KSAs and traditional kosher consumers attempting to harness technology encounter coordination problems. There is a body of literature debating the involvement of the state in coordinating technological growth and development.⁴⁴⁹ What one source can be used as a bank for information about fraud and mistake within the kosher world? Currently, kosher consumers can find different pieces of the puzzle in different places, including websites of KSAs and consumer watchdog groups. Yet no single source has emerged as the central bank for up-to-date kashrus information. Part of the difficulty is that centralizing information would require the recognition of one source as *the* authority for messages about what is happening in the kosher food industry.⁴⁵⁰ Given the highly politicized battle about what is kosher, and the fact that the competing sites all have vested interests in defining their own standards as kosher, the parties are involved in a coordination game: if there is one recognized source that is agreed upon, all KSAs and consumers are better off, but the individual payoff is even greater if one party's site can be selected as the one.

The solution, then, would be to use the state as the recognized bank for the industry. This would answer part of the crossover issue from

449. For a discussion of network externalities, see DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 208-12 (1994); see, e.g., Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. 332 (1985); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 772-73 (1995); Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 481 (1998).

450. See the various claims made by such sources. For example, kashrut.com declares itself to be "The Premier Kosher Information Source on the Internet" and kashrusmagazine.com uses the title "The Source for Reliable Kosher Information." Scharf Associates, Kashrut.com, Home Page, at <http://www.kashrut.com> (last visited Oct. 18, 2003); KASHRUS MAGAZINE Online, Home Page, at <http://www.kashrusmagazine.com> (last visited Oct. 18, 2003).

traditional to nontraditional consumers,⁴⁵¹ while also offering a cooperation-based strategy for the competing industry participants. The battle for standards (and constitutional quandary) would be solved by the fact that the state would not make any statement about the accuracy of the information it posted. Instead, the state could have a voluntary registration for private parties, who would submit their kashrus standards (or a statement of who they are), and send reports about instances of fraud or mistake. The website could list the reports and identify the party who made the report, with a link to the kashrus standards that party wishes to offer. The registration requirement could prevent spamlike submissions that could flood the site. In addition, the threat of libel liability would deter private actors from submitting falsified information. An alternative to voluntary reporting could be a state hired source gatherer who collects the data to report.⁴⁵² This implicates the fact that the source gatherer would act as a filter to the information provided, but the filtration concern would exist in any form. At some point, some person would choose what information gets posted and what does not.

There are several concerns that this proposal raises that need to be addressed as well. First, even with a disclaimer, there is the potential that the state could be liable for transmitting a libelous report. This could be solved by immunizing the state from liability based on some minimum registration requirement that limits access to the site to established institutions or organizations.

Second, the systems would have to attract reporting from the relevant parties with the information, while not creating incentives for harmful free riding. While it seems that these parties ought to welcome a cooperation-based solution to their difficulties, some might still hold out hope of a noncooperative strategy. This seems a more likely concern than the fear that parties would lose their incentive to investigate and share information on their own because private monitoring of behavior has been quite unrelated to the efforts of the state up to this point. One might view the efforts to collect and consolidate kashrus information not as a coordination game, but rather as a competitive enterprise between different watchdog groups. This process would constitute a subindustry in itself that is separate from the supervision and certification market. Though usually run as nonprofit, the watchdogs still com-

451. Note that this proposal does not solve the lack of free riding ability from group organization. It addresses only the cost of disclosing the information to these parties.

452. If the state gathers information from other collaborative sources, it may raise a question of misappropriation if such information constitutes *hot news* under *International News Services v. Associated Press*, 248 U.S. 215 (1918).

pete for advertisements and subscriptions.⁴⁵³ Because these sources usually provide far more than data about kashrus, a state information bank would not be a perfect substitute. But these groups, as opposed to KSAs who report information about their own marks and clients, may choose not to share with a centralized state information bank. If so, the state would then simply be one competitor among many and not a solution to a coordination game. Nonetheless, by including a state sanctioned information bank, the proposal still would meet its first goal of widening the audience of consumers who are privy to this data.

This proposal is modest. It recognizes that the strength of kosher supervision and certification lies in the efforts of private supervision and certification, monitoring, and sanctioning. This proposal does not seek to remove the legal protections afforded to kosher consumers or KSAs through the private law remedies of tort, contract, and trademark or the public law remedies of criminal or civil enforcement concerning consumer protection and welfare.

2. *Disclosure Models—New Jersey & Other Options*

After the New Jersey Supreme Court struck down its kosher fraud statute,⁴⁵⁴ the New Jersey legislature enacted the “Kosher Food Consumer Protection Act,” a statute that requires any dealer using the term “kosher” or “kosher for Passover” to post a disclosure of the standards used and to keep records that enable the attorney general to ensure compliance with this requirement.⁴⁵⁵ The standards are obtained via a questionnaire that asks the certifier to answer a list of questions meant to capture how stringent the supervision and certification is.⁴⁵⁶ This system shifts the state’s regulatory eye from food manufacturers and retailers toward KSAs and certifiers. Though the disclosure statute’s obligations fall upon “dealers,” it is only with the aid of the supervising and certifying KSA that a “dealer” would be able to fully complete the paperwork necessary to comply with the statute.

Other jurisdictions looking for kosher consumer protection in the wake of constitutional attack on the kosher fraud statute, including Baltimore and South Florida, plan to adopt disclosure statutes based

453. For a general discussion of why nonprofit management may resist consolidation, see Garry W. Jenkins, *The Powerful Possibilities of Nonprofit Mergers: Supporting Strategic Consolidation Through Law and Public Policy*, 74 S. CAL. L. REV. 1089, 1122-23 (2001).

454. *Ran-Dav’s County Kosher, Inc. v. State*, 608 A.2d 1353, 1355 (N.J. 1992).

455. N.J. REV. STAT. § 56:8-63 (2003); N.J. ADMIN. CODE tit. 13, §§ 45A-21.2, -21.4 (2003).

456. Interviews with a KSA representative and consumer watchdog (Fall 2002) (for interview clarification see *supra* note 5).

on the New Jersey model.⁴⁵⁷ The impetus for the disclosure statute came from the recommendation of the New Jersey Supreme Court suggested in *Ran-Dav's County Kosher*.⁴⁵⁸ One might be suspicious of the utility of any proposal that uses the kosher fraud statute as a starting point and deviates from it with the primary goal of avoiding constitutional invalidity.⁴⁵⁹ Nonetheless, it would be premature to examine the effectiveness of the kosher disclosure statute in solving problems facing kosher consumers. Reports from industry participants are mostly favorable; then again, reports about the kosher fraud statute from the same individuals have always been favorable too, even though they admitted the laws were arcane.⁴⁶⁰

At the same time, the disclosure model seems to address several of the concerns about difficulties facing kosher consumers noted above. Mandatory disclosure can help consumers facing a market that is increasingly flooded with KSAs that use kashrus standards that are not acceptable to the Orthodox mainstream. It can also help the nontraditional consumers who are not networked into the Jewish chain of internal information sharing and may only care about one or two kashrus standards for their proxy use.

One difficulty, though, that the New Jersey kosher disclosure statute creates is through its regulation of private-label food.⁴⁶¹ Private-label food is the mechanism by which supermarkets and other local or regional establishments offer their own product lines, without manufacturing their own food.⁴⁶² One manufacturer will prepare private-label food for a number of supermarkets, but expressly use different

457. Interview with a consumer watchdog (Fall 2002) (for interview clarification see *supra* note 5).

458. 608 A.2d at 1376.

459. There was a general sense among the interviewees that the state "shouldn't have five rabbis in a plant." Interviews with various KSA representatives and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5). This reflects a general tension within the Jewish world about whether it is better to have strong separation of church and state or not. This controversy is particularly visible in matters of education and the debate over vouchers for parochial schools. See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 706-07 (1994) (holding that Satmar Hasidim's special school district was unconstitutional); Nacha Cattan, *Court Ruling Buys Yeshiva Voucher Bids, Aguda Meets with Allies in Illinois*, FORWARD, July 5, 2002 (noting that Agudath Israel of America, a right-wing Orthodox group, and the OU are provoucher whereas the American Jewish Committee, the American Jewish Congress, and the Anti-Defamation League oppose the vouchers, resulting in the submission of amicus briefs on both sides of *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)), available at <http://www.forward.com/issues/2002/02.07.05/news1.html> (last visited Oct. 13, 2003).

460. Interviews with various KSA representatives and consumer watchdogs (Fall 2002) (for interview clarification see *supra* note 5).

461. Interview with a KSA representative (Fall 2002) (for interview clarification see *supra* note 5).

462. *Id.*

“private label[s]” for each client.⁴⁶³ The New Jersey model requires that kosher retailers present a paper trail that may obliterate the principle of the private label.⁴⁶⁴

While this problem can be fixed with minor tweaking, it suggests that the mandatory disclosure might intrude on an equilibrium created in a fairly functional subindustry for kosher supervision and certification. More importantly, it raises the question why existing voluntary disclosure within the kosher food industry is insufficient. In a competitive market, food manufacturers and vendors confident in the kashrus of their food would volunteer this information so consumers would choose their products. KSAs also would widely disclose the standards they use to supervise and certify products. This reality is borne out to some degree, as noted above. KSAs regularly have to divulge standards when working with other KSAs in the vertical food chain and are willing to answer consumer inquiries.⁴⁶⁵ Given this policy of limited disclosure, the costs of disclosure fall primarily on the consumers who care to find out.

Has the market somehow failed such that mandatory disclosure is necessary? Industries that produce nondisclosure strategies have characteristics whereby participants effectively can cooperate one with the other and engage in cartel like behavior.⁴⁶⁶ As the previous Section explained, KSAs have demonstrated no evidence of coordination that would suggest that the lack of full disclosure to consumers is the result of a strategy of cooperation.

To the extent KSAs do not disclose their exact standards to consumers, they offer reasonable explanations such as the need to protect client trade secrets, the lack of any clear document(s) to provide, or that the standards can be too complicated to explain to lay consumers (so that disclosure would unnecessarily worry consumers who lack the knowledge to understand the information disclosed). While these explanations might sound like excuses, the fact that even sophisticated kosher consumers readily accept some veil of ignorance about the standards used and prefer to rely on whether they trust a particular KSA

463. See *Kosher Private Label in Sharp Increase*, KOSHER TODAY, May 1997, available at <http://www.koshertoday.com/kosher%20today%20archives/1997/0597/main%20text.htm> (last visited Feb. 7, 2004).

464. N.J. ADMIN. CODE tit. 13, § 45A-21.3 (2003).

465. Interviews with various KSA representatives (Fall 2002) (for interview clarification see *supra* note 5).

466. Scholars have written extensively on mandatory disclosure within the corporate law context. See, e.g., George J. Bentson, *Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934*, 63 AM. ECON. REV. 132 (1973); John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717 (1984); Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1 (1983); George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961); Eric Talley, *Disclosure Norms*, 149 U. PA. L. REV. 1955 (2001).

suggests that mandatory disclosure is neither necessary nor even desirable.

Given the recent creation of the kosher disclosure statute, it would be imprudent to discredit its utility without a chance to gather evidence and observe its impact; nonetheless, the fact that it departs from the amount of disclosure the private market has generated suggests that these statutes might have some unintended consequences. Mandatory disclosure might increase the costs of kosher food, kosher food supervision, and certification by requiring those parties to bear the costs of compliance without conferring an equivalent benefit because this standard of disclosure has not been requested nor been desired by the consumers.⁴⁶⁷

V. BEYOND KOSHER FRAUD

While this analysis suggests a solution for the specific problem of fraud in the kosher food industry, it offers far more than that to those interested in studying consumer protection laws as well as those studying legal responses to the behavior of private market actors. Examining what works (and does not work) in the context of kosher fraud can serve as a model for other food industries or general areas of consumer product safety and authentication. Beyond the realm of consumer protection, the case study of kosher fraud identifies some relevant questions and answers about how law should and should not adjust to the behavior of private parties. This Section discusses applications outside of kosher fraud and then ties together the ramifications for legal theory in general that the study produced.

A. *Consumer Protection Examples*

The tale of the kosher food industry—particularly the role the kosher fraud statutes and other consumer protection laws have played—demonstrates the extent to which legal solutions should be based on nonlegal efforts to solve the difficulties of fraud and mistake. Yet, the experience of the kosher food industry, from its humble beginning to date, is not a unique story—it is just closer to the end of the book than other fledging, novel industries might be. It is analogous to other subindustries within the overall market for food and offers a framework for analyzing specialized legislation aimed to assist particular consumers or markets. In addition, the case of kosher food certification can be used to examine the need for legal support of other

467. It should be noted that while the disclosure statutes were requested as a matter of legislative subsidy, the move towards disclosure came from an idea of how to make kosher fraud enforcement pass constitutional muster, rather than an original exploration of options that would help consumers. *Ran-Dav's County Kosher, Inc. v. State*, 608 A.2d 1353, 1366 (N.J. 1992).

product certification efforts, such as safety labeling. First, this Part will apply the lessons of the kosher food industry to develop a template for other specialized areas of food regulation, before tackling the issue of consumer protection and private efforts to monitor and sanction for safety.

1. *Other Food Subindustry Applications*

Though kosher was one of the first *ethnic* food industries to establish widespread labeling, the kosher model is worthy of study by members of those ethnic food industries who wish to find manners in which they can integrate their own standards and create an identification system within the food industry as whole. While the information-sharing proposals above would help kosher-proxy users obtain information at the outset, it seems that proxy-using consumers ultimately may be better off with their own private ordering obtained through internal monitoring, certification, and sanctioning that rely on their own communal sanctions. To the extent these groups can overcome internal and external barriers to self-certification, the kosher model presents an example of what a well-functioning supervision and certification subindustry looks like, and when state protection might be necessary to fill in the gaps. At the same time, this analysis forces us to recognize the dichotomy of theories for food regulation and its dual role within consumer protection laws: special interest subsidization and general legislation on matters of public health and welfare.

There are three emerging food industries that particularly could benefit from the lessons of the kosher model. These markets are halal food, allergy-safe food, and organic (or nongenetically modified) food. This Section will discuss each one briefly to extrapolate what the kosher experience may suggest in each context.

(a) *Halal Food*

As described above, Halal supervision and certification in the United States is in its infancy.⁴⁶⁸ Supervision and certification is primarily left to local establishments and Halal Certifying Agencies (HCAs) have not taken a strong hold in the nationwide market for packaged food.⁴⁶⁹ Yet like in the kosher world, Muslims can rely on their religious and social communities to monitor and sanction fraudulent actors. The foundations that create the private ordering in the Jewish world exist within the Muslim world too.

468. See discussion *supra* Section II.C.2.

469. *Id.*

The lack of many HCAs may be attributed to several factors. First, the halal laws only apply to animal-sourced food;⁴⁷⁰ unlike kosher, the vast majority of food does not need any certification at all. Accordingly, there is less demand for a comprehensive network of halal supervision and certification. Use of the kosher proxy is another reason for the slow growth—to the extent Muslims find kosher sufficient or food providers think that kosher supervision will appeal to halal consumers—it curtails demand for yet another form of supervision. Because the cost of supervision is fixed, it seems logical that the most efficient form of supervision might be a KSA that works in conjunction with an HCA, with each maintaining a reputation within its own religious community.⁴⁷¹

Nonetheless, halal consumers are increasingly turning to methods of labeling and policing that mirror the kosher experience. At the same time, a handful of states have enacted halal fraud statutes that mirror the kosher fraud laws.⁴⁷² Just like in the case of kosher, the critical mass needed to gain special subsidization occurs roughly at the same time the critical mass needed to create a private system of supervision and certification emerges. And just like with kosher, the laws present a constitutional problem: the state must define what halal means or refer to some religious understanding of the concept. Like kosher, halal has no meaning independent of religion. New Jersey has avoided this difficulty by enacting a halal disclosure statute, which is analogous to the kosher disclosure statute.⁴⁷³

These statutes may serve to express state approval of its Muslim constituencies, but it is unclear how they will help Muslims combat the fraudulent sale of halal food or how they apply to problems that may be unique to halal consumers. The biggest problems facing kosher consumers today, such as mistakes and proliferation of marks, are the difficulties that come with having such widespread supervision and certification on many different products by many different organizations. Perhaps the issue for halal consumers is how to find strategies for growth within the United States. Given the prevalence of international halal supervision, perhaps the key is identifying legal rules that encourage trade in halal certified food products between the European

470. *Id.*

471. For political reasons, reputable organizations may fear joint faith efforts to supervise and certify foods.

472. CAL. PENAL CODE § 383c (Deering 2003) (including “halal’ meats and meat preparations,” sale and labeling regulations, false representations, punishment, and halal defined); 410 ILL. COMP. STAT. ANN. 637/1 (West 2003) (“Halal Food Act”); MICH. COMP. LAWS § 750.297f (2003) (including the possession, sale, exposure for sale, labeling, advertising, and so on, of halal food products); MINN. STAT. §§ 31.658, .661 (2002) (“Halal food requirements”); N.J. STAT. ANN. §§ 56:8-98 to :8-103 (West 2003) (“Halal Food Consumer Protection Act”). In addition, the Texas legislature is considering passing a halal food act as well. Eileen E. Flynn, *Muslims Back Bill to Regulate Labeling of Islamic Foods*, AUSTIN AMERICAN-STATESMAN, Feb. 8, 2003, at B1.

473. N.J. STAT. ANN. § 56:8-100 (West 2003) (“Halal; disclosure”).

Union or Middle East and the United States. Without having empirical data on the needs of halal consumers and the operation of this market, these are simply guesses. The kosher model demonstrates to halal users a method for achieving supervision and certification labeling. This model also suggests that if consumers within the same ethnic industry (kosher) need to reassess how law complements their private efforts over time, then surely proxy users developing their own industries ought to identify their own specific needs rather than simply copying existing legislation that provides a template.

(b) *Allergy-Safe Food*

Beyond the constitutional dimension, if the kosher and halal examples engender skepticism toward state standard setting, it is because the proven or potential ability for functional private ordering makes such legislation seem like rent-seeking subsidization. But some contexts possess stronger policy arguments for requiring government standard setting and even government certification. The labeling of allergy-safe food is one such area. As noted above, the kosher proxy is not only imperfect but also occasionally dangerous for allergic individuals. Accordingly, it may be the case that special allergy-safe legislation is needed.⁴⁷⁴

There are three aspects that set allergy-safe consumer protection apart from the examples of kosher and halal. First, like the majority of government commodities regulation, labeling for allergy-safe products can rely on purely scientific standards. For example, government labeling requiring that *nondairy* products actually contain no dairy proteins⁴⁷⁵ would create a baseline that seems acceptable within our general frame of public health regulation. This is analogous to government requirements for unadulterated food products (such as milk) except in this context, the costs may be greater and less people may benefit.⁴⁷⁶ The theory for the regulation remains the same.

This leads to the second distinction: there may not be enough consumers who are sufficiently connected to be able to gain access to the production process and create a private system of labeling.⁴⁷⁷ Thus, it

474. See the recent discussion about bans on peanuts in airplanes and schools to create allergy-safe environments. A. Wesley Burks, Jr., M.D., *Back to School: Peanut Allergies and Peanut Free Zones*, ALLERGY & ASTHMA ADVOCATE, at <http://www.aaaai.org/patients/advocate/1999/summer/backtoschool.stm> (Summer 1999) (on file with author).

475. This is not the current standard. See *supra* note 197 and accompanying text.

476. The strong dairy lobby would likely protest.

477. See generally *Bennett v. Pilot Prod. Co.*, 235 P.2d 525, 527 (Utah 1951) (injuries from allergic reactions to products are not compensable as a matter of law). Interestingly, the group of allergic individuals disproportionately consists of children, see Sampson, *supra*, note 194, so one might think that this fact justifies increased government action. Of course, usually the parents of these children are the actual consumers (in an economic sense) of the food in question.

might be that the allergy-safe context presents precisely the appropriate conditions to justify government standard setting rather than relying on protections aimed at cultivating strong private certification intermediaries.

Lastly, unlike kosher and halal consumers, there is no element of choice.⁴⁷⁸ Allergic individuals have not chosen to restrict their diets. While viewing allergies as a medical infirmity, government certification on behalf of involuntary consumers seems much more like a type of health insurance.

(c) *Organic or Nongenetically Modified Food*

Given a regulatory framework that puts kosher (and halal) on one side and allergy-safe labeling on the other side, the question is what lesson is emerging for the developing industries of organic⁴⁷⁹ or nongenetically modified food (non-GMO)?⁴⁸⁰ Several identifying questions have emerged through the analysis of kosher and attempts to apply it to other cases. Scholarship on organic or non-GMO food abounds;⁴⁸¹ accordingly, this Part sketches the tripartite approach that stems from the kosher model and briefly applies it to organic or non-GMO industries.

First, what determines the standards?⁴⁸² Are they based in science or religion? Note that this question forces a critical distinction within the religion/science divide. Imagine that a group of people seeks to eat

478. The depiction of religious beliefs as *choice* invites a theological debate that is beyond the scope of this Article. While one might argue that observing religious diets is a choice, due to free will, this proves too much. Highly allergic individuals can also choose to eat foods that produce an allergic episode.

479. See Gutman, *supra* note 104, at 2381-84 (advocating a system of private labeling for organic akin to kosher and warning that a national standard could prevent the development of successful certification).

480. See J. Howard Beales III, *Modification and Consumer Information: Modern Biotechnology and the Regulation of Information*, 55 FOOD & DRUG L.J. 105, 111 (2000) (comparing the likelihood of private market labeling for nongenetically modified food to the kosher example); Thomas O. McGarity, *Seeds of Distrust: Federal Regulation of Genetically Modified Foods*, 35 U. MICH. J.L. REFORM 403, 501-02 (2002); Kelly A. Leggio, Comment, *Limitations on the Consumer's Right to Know: Settling the Debate Over Labeling of Genetically Modified Foods in the United States*, 38 SAN DIEGO L. REV. 893 (2001).

481. See, e.g., Sally J. Kelley, *Agricultural Law: A Selected Bibliography, 2001*, 55 ARK. L. REV. 303, 340-46, 362-63 (2002) (listing articles and books discussing food and food regulation).

482. Not all private efforts in the name of gaining state or local enforcement of particular standards are immune from antitrust law under *Noerr-Pennington* immunity as established by *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 510-11 (1988) (subjecting National Fire Protection Association's exclusion of plastic conduits in its National Electric Code, which was then adopted by state and local governments as law, to antitrust laws); *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 577 (1982) (holding that ASME's safety code exclusion of safety device in boilers that was incorporated by reference into federal regulations and state and local laws could make ASME liable for antitrust violations).

only foods that appear in plays written by William Shakespeare. This would be a form of secular religion by using a body of literature as the textual basis for the dietary restrictions. But what about a group that excludes from their diets certain foods within the animal kingdom—or even all such foods—and defines the animal kingdom based on scientific classifications? Does the underlying source make these dietary restrictions *science* rather than secular religion? Or is the *science* category reserved only for those parties who have a scientifically accepted reason for their diet?

Next, we would ask whether the relevant consumer group is voluntary or involuntary. Lastly, we examine whether there is a critical mass belonging to a shared community that could mobilize to create a private regime of norm enforcement.

While there is no constitutional dimension⁴⁸³ to the fight over organic, the politics are the same as kosher: which orthodoxy will prevail? There is no scientific definition of *organic*; thus, an organic diet is a form of secular religion. On the other hand, the debate over labeling genetically modified (GMO) food can find its roots in science. That is, there may be debate whether GMO foods are harmful or inferior to non-GMO food, but there is a scientific basis for identifying what constitutes GMO food. The key is whether science requires more than that, and if so, what the evidence about GMO food demonstrates. As a result, it might be the case that organic and non-GMO food regulation should differ.

Consumers seeking both organic or non-GMO food are voluntary. But the last part of the inquiry is not clearly answered. It appears that there is certainly a critical mass of consumers interested in organic or non-GMO food. The residual question is whether these consumers actually share a community such that they can sufficiently rely on certification intermediaries.⁴⁸⁴ The unintended consequences⁴⁸⁵ of the National Organic Program, which sets criteria for organic labeling and USDA accreditation of certification intermediaries,⁴⁸⁶ may demonstrate

483. Despite being held constitutional by the Supreme Court in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), a district court has declared the filled-milk statute unconstitutional as applied to the product and company in *Milnot Co. v. Richardson*, 350 F. Supp. 221, 225 (S.D. Ill. 1972), and it is no longer enforced. Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397 (1987) (demonstrating how the powerful dairy lobby successfully prevented competition from milkfat substitutes in the markets for milk and cheese).

484. See, e.g., Jamie A. Grodsky, *Certified Green: The Law and the Future of Environmental Labeling*, 10 YALE J. ON REG. 147 (1993) (examining the success (and pitfalls) of environmental certification and arguing for a private-public, hybrid system of regulation).

485. See, e.g., Marian Burros, *U.S.D.A. Enters Debate on Organic Label Law*, N.Y. TIMES, Feb. 26, 2003, at F1 (reporting that organic proponents are at odds with the U.S.D.A. for what they perceive as a weakening of the National Organic Program).

486. The National Organic Program, available at <http://www.ams.usda.gov/nop/> (last visited Oct. 19, 2003).

a lack of shared community (or ideals) by the critical mass of diverse consumers (and other interests) that sought the regulation. This may also be reflected in the lack of any source as starting point for defining *organic*. Accordingly, there may be some form of regulation of organic food that can be more appropriately viewed as steeped in a theory of public welfare rather than subsidization, despite signs that the existing regime is the latter.

Beyond the tripartite approach, which offers an analysis when food regulation appears to be based in consumer protection theories of social welfare rather than subsidization, the kosher fraud model is useful in another way. It also demonstrates that when interest groups do focus on food regulation as subsidization, even more important than the definition fight may be the nature of the protection afforded. Factors to be considered include the resources afforded and the extent to which the enforcement complements, rather than duplicates, private monitoring, labeling, and information-sharing. Each subindustry may find a different equilibrium based on its own private landscape.

2. *Lessons for and from Consumer Safety*

Consumer safety through private product certification and labeling actually predates the kosher model. Founded in 1894, Underwriters Laboratories Inc. (UL) is a nonprofit organization that tests and certifies products in a host of industries, including household appliances, wiring, and commercial equipment.⁴⁸⁷ Underwriters Laboratories does not compare competing products; it simply identifies that a minimum standard has been met.⁴⁸⁸ Today, the UL mark can be found on approximately 17 billion products.⁴⁸⁹

The Consumers Union, another nonprofit organization involved in consumer safety, was established in 1936.⁴⁹⁰ Unlike Underwriters Laboratories, the Consumers Union does not certify products.⁴⁹¹ Rather, it tests products and provides information for consumers through its magazine, *Consumer Reports*.⁴⁹² In addition, the Consumers Union serves as an advocate for consumer protection before legislatures and courts.⁴⁹³

487. Underwriters Laboratories Inc., Home Page, at <http://www.ul.com/> (last visited Oct. 11, 2003); see *ECOS Elecs. Corp. v. Underwriters Labs.*, 743 F.2d 498, 503 (7th Cir. 1984) (holding that UL does not act to restrain trade simply by certifying a competing product).

488. *ECOS*, 743 F.2d at 500.

489. Underwriters Laboratories Inc., *supra* note 487.

490. *About Consumers Union*, at <http://www.consumersunion.org> (Link About CU) (last visited Nov. 6, 2003). Also, a new kosher consumer group called the "Kosher Consumers Union," is based at: <http://www.kosherconsumer.org>.

491. *About Consumers Union*, *supra* note 490.

492. *Id.*

493. *Id.*

There are lessons to be shared between the kosher model and the area of consumer protection more generally. First, each has its own fight about standards: what is required of a manufacturer or retailer to deem his or her product *kosher* or acceptable? While everyone wants some baseline that is acceptable, how can the government leave room for private markets to set their own standards?⁴⁹⁴ Since law trumps, the focus should be on setting appropriate minimums that are premised in some *scientific* superiority.

What consumer decisions will be deemed involuntary? Does this depend on whether a particular product is a necessity? How widespread it is? Allergic individuals are a captured market. What other consumer markets mimic this setup? And what of the requirement that examines whether a critical mass of consumers within a shared community exists? How does this get identified in the context of general consumer safety?

There is a critical mass supporting consumer safety regulations. However, due to a lack of shared community, the process of information sharing and recall is far weaker in the nationwide safety context than within the kosher model. In this regard, consumer safety can learn from kosher fraud. What does the state need to do to mimic the results of smaller, cohesive social networks? Perhaps the answer is that product recall information needs to be posted in places like synagogues, churches, and mosques, not to mention schools or health clubs.

Using this tripartite approach to discover when there might be regulatory failure that justifies consumer protection laws and when such legislation is mere subsidization, might lead to different outcomes in different industries depending on the nature of the consumers involved. General consumer fraud protection statutes are littered with applications to different industries; do we really want bifurcated consumer protection laws that depend on the political power of the consumer group involved rather than the actual likelihood of harm?⁴⁹⁵ The very characteristics that make the kosher food industry so successful at internal monitoring and sanctioning—unified goals, cohesive communal

494. See Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193, 2214 (1989) (arguing that product liability laws preclude some bargains that would be advantageous to consumers).

495. The automobile industry is replete with federal safety standards that reflect the respective strength of the industry lobbies and consumers. For a discussion of the treatment of the implementation of mandatory airbags versus passive restraints, see *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), and consider the role of the automotive industry in treatment of the enactment (or lack thereof) of fuel efficiency standards for SUVs and lightweight trucks. See Martin Wolk, *America's Showdown on Gas Mileage: Will SUV-Makers Improve Gas Efficiency Themselves . . . Or Be Forced To?*, MSNBC News (June 8, 2003), at <http://www.msnbc.com/news/581511.asp?cp1=1>. This does not mean to imply that such standards are ineffective at protecting consumers. See Joan Claybrook & David Bollier, *The Hidden Benefits of Regulation: Disclosing the Auto Safety Payoff*, 3 YALE J. ON REG. 87 (1985).

links, and so on—are the ones that give its participants the clout to obtain legislative subsidies.⁴⁹⁶ This creates an inherent tension in the fact that consumer protection legislation creates a *prima facie* presumption of political power and rent-seeking behavior.

B. *Extrapolating from Kosher*

The kosher fraud example presents a model that is somewhat unique compared to previously explored industries and private groups within social norm literature. Whereas other examples feature groups that have eschewed courts as an instrument for enforcement of contract or tort law,⁴⁹⁷ participants in the kosher food industry have both engaged in extensive private monitoring and sanctioning as well advocated in favor of specialized state civil and criminal penalties to aid them in efforts to combat fraud within the kosher food industry. In order to extrapolate from kosher, one must first acknowledge the leap from what previous scholarly works have argued to a theory supporting the kosher case and the proposal offered above.

First, scholars have demonstrated that private groups can establish methods of dispute resolution and sanctions that do not require legal enforcement of contracts.⁴⁹⁸ These case studies show how nonlegal mechanisms may be more efficient than traditional contract law,⁴⁹⁹ yet the legitimacy of the private efforts need not be linked to their potential superiority; rather they can be accepted on a strong freedom of contract theoretical basis. That is, the private monitoring and sanctioning systems present an acceptable or even favorable alternative to the traditional law of contract precisely because the norms and understandings of the parties they govern create them. Consent is the key. At any point, an actor can choose the law, which is why it is meaningful to study when and why they do not.

From a libertarian perspective, one might think that some private groups likewise should be allowed to self-police and opt out of the legal system mechanisms that combat tortious conduct as well. In fact, the classic “Order Without Law” circumstances described just that—parties

496. See generally *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (suggesting that constitutional protection ought to be more stringent when the political process fails discrete and insular minorities). For a critique of footnote four as a useful tool for constitutional law, see Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

497. See ELLICKSON, *supra* note 1 (cattle ranchers); Bernstein, *supra* note 3 (diamond merchants).

498. Compare the kosher model with the behavior of Japanese firms who voluntarily subjected themselves to strict liability rules to attract buyers. J. Mark Ramseyer, *Products Liability Through Private Ordering: Notes on a Japanese Experiment*, 144 U. PA. L. REV. 1823 (1996).

499. See sources cited *supra* note 7.

rejecting private law options in the face of tortious behavior and creating their own order.⁵⁰⁰

It is not particularly controversial to note that parties do not take advantage of the legal enforcement mechanisms available to them in all circumstances. The question when and why some private actors reject private law remedies presents an interesting area for study that scholars have grappled with for some time.⁵⁰¹ Are private sanctioning systems adequate or even superior compared with engaging in legal battles? Are legal remedies somehow flawed? After all, it is one thing to determine that some private actors within a particular community find alternative dispute resolution preferable because it has unique advantages; it is another to discover that the law itself simply does not vindicate the rights in question at all or very well.⁵⁰² The key to this inquiry is choice. Similar to the contractual model's reliance on consent, do parties opt out of private law remedies because they choose an internal enforcement mechanism they prefer or because they feel that the current law and its application give them no choice?

Taking this one step further, assuming that the choice question is resolved favorably, what of state civil and criminal prosecution in the wake of private organizations, groups, and industries that would prefer to opt out and self-police? Are private systems creating superior mechanisms for enforcement? Are there other public policy difficulties implicated from privatizing policing?

In the kosher fraud example, the parties have turned to a complex system of private monitoring, certifying, and sanctioning in order to combat the problems of fraud and mistake. Kosher consumers have rejected private law remedies. At the same time, state civil and criminal enforcement activity floats in the background despite its limited effectiveness.

It is important to recognize that this Article's proposal—that state resources could better serve consumers of kosher food through information-sharing devices rather than kosher fraud statutes—runs counter to the expressed desires of the general class of parties it seeks to help. This Article aims to convince kosher consumers, in general, and industry participants that its proposal deals better with problems facing the kosher food industry today than existing legal regimes, and it serves as an invitation for other proposals linked to curing demonstrated prob-

500. See Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996) (criticizing the belief that social norms are efficient and demonstrating how the state can limit the impact of inefficient norms).

501. See, e.g., ELLICKSON, *supra* note 1.

502. See, e.g., Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185 (1996) (discussing how parties "opt out" from various forms of state services and whether these individual or community based opt out decisions suggest that the legal rule ought to change).

lems within the industry. If accepted, then the opt-out solution is easy. Kosher fraud statutes are constitutionally suspect, so industry participants could simply drop their current efforts to reenact variations of the kosher fraud statute in favor of a strategy favoring other legal alternatives. While this Article demonstrates that nonlegal sanctions can be more effective and preferable to tort and criminal law, it reserves the question whether and when the state should permit private market opt out from tort or some criminal law in other circumstances for future analysis.

Yet despite hopes that the evidence and arguments presented above will convince private actors to forgo seeking specialized civil or criminal enforcement options, any theory attempting to link the kosher fraud example to other case studies of nonlegal monitoring and sanctioning might also want to recognize the hurdle that lack of consent or choice presents. If the goal of the state is to truly assist the group that the enforcement subsidy seeks to help, then it might seem appropriate for someone to conduct an independent examination of the existence of private enforcement, such as nonlegal monitoring, sanctioning, and information sharing, before formulating what form of subsidies would be most effective. But this seems to suggest that the state would know what private parties need better than they do themselves. This problem is due to the forced dichotomy that occurs when groups couch their arguments for consumer protection subsidies in terms that appeal to sensibilities of the state's role in ensuring public welfare. How is the legitimacy of consumer protection laws affected by their underlying justifications for enactment? Would our political discourse be better off or perhaps worse off if subsidization requests were more transparent?

This raises a global question that this Article does not attempt to fully answer: why do groups seek subsidies that are largely inefficient or appear outright unnecessary? Solving this larger public choice query would be an important step toward closing the gap between the subsidy sought through the legislative process and the *perfect* subsidy to combat the problem identified. This suggests that the normative value of subsidies might need to be linked to their ability (or lack of ability) to fulfill some particular intended goal.

And even more broadly, the kosher fraud example suggests that there might be the need for a metatheory when tort and criminal law theories of public interest or social welfare policy collide with public choice and norm theory understandings of subsidization, consent, and opt out. How can we view criminal and state civil enforcement of consumer protection law through both the lens of public choice and the lens of traditional theories of criminal law? The tension produced by this intersection clouds the picture of what appropriate legal protection for kosher consumers and consumers in general should look like.

VI. CONCLUSION

While the constitutionality of the kosher fraud statute has captured the attention of the courts, government officials, scholars, and the community of kosher consumers in general, this focus is misplaced. Extensive private ordering (monitoring, certifying, sanctioning, and information sharing)—so much that it has created a robust subindustry of supervision and certification—identifies and includes much of the behavior that the kosher fraud statute aims to prevent. There is no evidence that state kosher fraud enforcement plays a significant role in preventing willful kosher fraud; nor is there evidence that enforcement addresses the problems facing kosher consumers today. As a result, this Article has demonstrated that legal efforts to aid kosher consumers, thus, would best serve to complement the existing nonlegal sanctions by facilitating voluntary information-sharing where the private market solutions fall short.

In the process of analyzing kosher fraud statutes and examining consumer protection laws more generally, this Article has identified an inherent tension these regulations present. On one hand, specialized consumer protection laws are rooted in criminal law theories of public interest or social welfare. They are situated within the realm of traditional state functions, such as punishing wrongdoing, making determinations of *just* behavior, maintaining a monopoly on the use of force as a means of dispute resolution, and solving collective action problems among a disjointed populace. At the same time, these regulations can also be viewed through the lens of public choice and norm theory understandings of subsidization, consent, and opt out. That is, the laws demonstrate how small, cohesive interest groups capable of sophisticated private ordering, like kosher consumers, can succeed within the political process to obtain special protection through statutes and regulations that may not even be well suited to achieve their purported goals.

This Article has offered a tripartite approach for categorizing food regulation laws within the context of these two competing theoretical approaches, laying the foundation for an analysis of the legitimacy of these laws and suggesting the need for more empirical research regarding subsidization and norm enforcement.